SUPREME COURT, U. S.

AUG 24 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 584

DURWOOD T. PYE,

Appellant,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA,

and

HOWARD W. ALLGOOD,

Appellees.

Appeal from the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Durwood T. Pye, Appellant
Pro Se
801 Fulton County Courthouse
Atlanta, Georgia

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3. Copies of both the majority opinion and the dissenting opinions delivered in the Supreme Court of Georgia upon the rendering of the judgment sought to be reviewed are appended.

4. No official or unofficial report of the opinion of the Superior Court of Fulton County, Georgia, which was affirmed by the judgment of the Supreme Court of Georgia sought to be reviewed, has been published.

5. A copy of such opinion and judgment of the Superior Court of Fulton County, Georgia, is appended.

(3)

A concise statement of the grounds on which the jurisdiction of the Supreme Court of the United States is invoked:

(i) The proceeding is a condemnation proceeding brought by State Highway Department of Georgia, pursuant to the Act approved April 5, 1961, Ga. Laws 1961, pages 517-529, inc., as amended; portions of which Act are appended, to acquire by condemnation fee simple title to appellant's residence in the City of Atlanta, Georgia, for a right of way for a certain State-aid road (Limited Access Highway) known as Project No. F 056-1 (12), and to obtain judgment ordering appellant to surrender possession.

Said Act of 1961, providing for taking private property for State-aid public road purposes, in advance of payment of just and adequate compensation therefor, and under the procedure of said Act, depends *ex-*

clusively for its validity upon an *amendment to the Constitution of the State of Georgia*, proposed by a Resolution of the General Assembly set forth in *Georgia Laws 1960, pages 1225-1227, inc.*, a copy of which is appended, and proclaimed by the Governor to have been submitted to the people and ratified by them at the General Election held November 8, 1960, and thus a part of the Constitution of Georgia.

Prior to said Amendment, Art. 1, Sec. 111, Par. 1, of The Constitution of Georgia (Code, Ann., Sec. 2-301), provided in material part: "Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation *being first paid.*" The Georgia law in that regard is stated as follows: "The 'just and adequate compensation' which must be paid under our Constitution before private property can be taken for a public use is that amount which may be awarded as such by a proper tribunal *after the parties at interest have been afforded a reasonable opportunity to be heard* .... To comply with our Constitution, just and adequate compensation must be paid to the owner *before* his property can be taken for a public use, and fundamental to our jurisprudence *is the owner's right to be heard* upon the issue of what amount constitutes fair and adequate compensation." *Pilgreen v. City of Atlanta, 204 Ga. 710, 713; Harrison v. City of East Point, 208 Ga. 692.*

Said Amendment to the Georgia Constitution (*Ga. Laws* 1960, pages 1225-1227), undertook to *create an exception* to the requirement of *prior payment*, in respect of private property taken or damaged by the

State and the counties and municipalities of the State for public road and street purposes, providing, in substance and in part, that, in such cases, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, and further providing that such payment required to be then made, is subordinated to the payment of bonded indebtedness.

Appellant defended against the condemnation proceeding by pleadings filed therein alleging the illegality thereof; defended similiarly against the motion of State Highway Department for possession; and filed a separate suit in equity which included similar contentions. All these pleadings were consolidated, and the Superior Court of Fulton County by its judgment and opinion struck all of appellant's pleadings except those relating to what amount of money constitutes just and adequate compensation; held in substance that State Highway Department of Georgia had acquired the fee simple title to appellant's land and residence; and ordered appellant to surrender possession subject to appeal.

Appellee Howard W. Allgood was on appellant's motion made a party, State Highway Department of Georgia having sold the residence and improvements to Allgood about December, 1967, prior to the filing of the condemnation proceeding February 21, 1969, the sale being subject to acquisition, and requiring Allgood upon notice to demolish appellant's residence and the other improvements. Appellant prayed appropriate relief against Allgood.

Among appellant's contentions of illegality presented by his aforesaid pleadings was the contention that said Amendment, if submitted to the people of the State and ratified by them, *was ineffective because violative of the due process and equal protection clauses of the Fourteenth Amendment, in that payment for the lands taken is subordinated to the payment of bonded indebtedness.*

Both the Superior Court of Fulton County, Georgia, and the Supreme Court of Georgia, found against this contention. The Supreme Court of Georgia (three Justices dissenting) held that the Amendment was validly submitted to the people, and was a part of the Constitution of Georgia; and a majority of the Supreme Court of Georgia held that the Amendment was not violative of the United States Constitution.

(ii) The Judgment sought to be reviewed is the judgment of the Supreme Court of Georgia decided and dated June 8, 1970, and entered June 8, 1970. No motion for rehearing was made, and there is no order respecting a rehearing.

The Notice of Appeal to the Supreme Court of the United States was filed July 9, 1970, in the office of the Clerk of the Supreme Court of Georgia.

(iii) The statutory provision believed to confer on the Supreme Court of the United States jurisdiction of this appeal is 28 U.S.C., Section 1257 subsection (2), as follows, to-wit:

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: .....

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, Treaties, or laws of the United States, and the decision is in favor of its validity."

(iv) Cases believed to sustain the jurisdiction:

Chicago, Burlington and Quincey Railroad Co. v. Chicago
166 U.S. 226

Backus v. Fort Street Union Depot Co.
169 U.S. 557

Kaukana Water Power Co. v. Green Bay and Mississippi Canal Co.
142 U.S. 254

(v) The validity is here involved, of the *Amendment* to the Constitution of Georgia, amending *Article 1, Section 111, Par. 1 of the Constitution of Georgia*, which Amendment is set forth in the Resolution of the General Assembly of Georgia proposing it to the electors, and appears in *Georgia Laws, 1960, pages 1225-1227, inc.*

Said *Article 1, Sec. 111, Par. 1, of the Constitution of the State of Georgia, as thus amended*, follows the

Amendment alleged to be invalid because repugnant to the Constitution of the United States, *being set forth in italics*, to-wit:

Paragraph 1. In case of necessity, private ways may be granted upon just compensation being first paid to the applicant. Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid, *except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders and the State and its subdivisions may be protected.*"

A copy of the judgment of the Supreme Court of Georgia is appended.

A copy of the Notice of Appeal to the Supreme Court of the United States is appended.

(C)

The Questions Presented by this appeal:

1. Does the aforesaid Amendment of Art. 1, Sec. 111; Par. 1. of the Constitution of Georgia, whereby payment for private property taken or damaged for public road and street purposes, by the State, the counties and the municipalities thereof, is subordinated to the payment of bonded indebtedness, deprive the owner of such property without due process of law, in derogation of the 14th Amendment of the Constitution of the United States of America?

2. Does said provision subordinating payment to the owner of the property, to the payment of bonded indebtedness, in the context of the Amendment whereby the taking of private property is authorized before payment, and payment of compensation is postponed until the amount thereof is finally fixed and determined, when payment shall then be made in preference to all other obligations except bonded indebtedness, make reasonable provision for prompt compensation to the owner of the land, so as to comply with the due process of law guaranteed all persons as against the States by the Fourteenth Amendment of the Constitution of the United States of America?

3. Or, on the contrary, does not said Amendment unreasonably impede the right of the land owner to prompt payment of compensation, and thus affirmatively deny such due process of law?

4. Does not said provision for subordination, deny to the owner of the private property taken, the equal protection of the laws, by erecting in favor of the holders of bonded indebtedness an unreasonable priority of payment, violative of the Fourteenth Amendment of the Constitution of the United States?

5. Is not the aforesaid Amendment of Art. 1, Sec. 111, Par. 1, of the Constitution of the State of Georgia, entire and inseparable, so that, as said portion thereof providing for subordination of payment for property taken, to the payment of bonded indebtedness, is repugnant to the Constitution of the United States, the entire Amendment is likewise repugnant, and therefore void; and Art 1, Sec. 111, Par. 1, of the Constitution of Georgia stands as written before said Amendment thereto was proposed, and provides in material part, as follows, to-wit:

> "Privately property shall not be taken, or damaged, for public purposes *without just and adequate compensation being first paid.*"?

6. And does it not therefore follow, that the *Act of the General Assembly of Georgia, aproved April 5, 1961, Georgia Laws 1961, pages 517-529*, inc., as amended, providing for the taking of private property *prior to payment of just and adequate compensation therefor*, and dependent for validity upon said Amendment, is insufficient to sustain the condemnation proceedings, and that as said proceedings are not otherwise authorized by any law of the State of Georgia,

said condemnation proceedings are invalid, and a trespass upon appellant's land and residence?

7. Is not the judgment of the Supreme Court of Georgia, affirming that of the Superior Court of Fulton County, necessarily in derogation of the Constitution of the United States as stated, each in (a) holding that State Highway Department of Georgia acquired title to appellant's residence and land, (b) holding that appellant should surrender possession, (c) holding that appellant was entitled to no relief against Howard W. Allgood except during appeal?

8. After holding in the first headnote of its majority opinion that said Amendment of Article 1, Section III, Paragraph 1 of the Constitution of Georgia, "does not violate the United States Constitution," the Supreme Court of Georgia states further in subdivision (b) of division 1: "In our view he (appellant) lacks standing to make this contention. This estimated amount of compensation for taking his property was in fact paid into Court. He has not been injured by the subordination provision and therefore does not show any 'infringement upon his rights' due to such provision. (cit.)."

Thus the question is presented whether the judgment of the Supreme Court of Georgia rests upon a non-Federal question adequate to sustain it.

Appellant contends that it does not for the following reasons, to-wit:

(a) The Amendment is necessary to authorize the taking of appellant's property without notice and hearing on the question of just and adequate compensation; and the Amendment being invalid in its entirety as in derogation of the Constitution of the United States, the Act of 1961 pursuant to which the property is taken without first paying just and adequate compensation as determined after notice and hearing, is necessarily invalid; and there is thus no law of Georgia to authorize the *instant condemnation proceeding.*

(b) (i) The estimated amount of compensation paid into Court ($19,000.00) was arrived at ex parte by State Highway Department of Georgia without notice to appellant or opportunity to be heard; and purports to be only an "estimate."

(ii) Said "estimate" does not include any payment for appellant's interest in the rear 20 feet of his residence lot in the City of Atlanta, Georgia, referred to as "the 20 foot reservation."

(iii) Said "estimate" does not purport to include any sum for moving expenses, as to which the Supreme Court of Georgia holds: "The property owner will have the opportunity to prove such expenses."

(iv) Said "estimate" does not refer to items of damage other than to "estimate" the "mar-

ket value" of that portion of the property lying beyond the "20 foot reservation" toward Poplar Circle, the street on which the property fronts; and as to items of damage not "estimated," the Supreme Court of Georgia holds: "Upon a trial before a jury the property owner will have the opportunity to introduce evidence in support of all legitimate items of damage that he has suffered."

(c) It follows that appellant's just and adequate compensation over and above $25,000.00, may not be paid him until the same has been "finally fixed and determined as provided by law," and that such compensation only then shall be paid him, and that shall not be *subordinated to bonded indebtedness*. Appellant contends such is in derogation of the process of law and the equal protection of the laws in like manner as stated above.

(D)

A concise statement of the case containing the facts material to the consideration of the questions presented.

(Note: the references to the pages of the Record are as indicated on the left of each page of the record.

The lands condemned are described in the condemnation proceeding by the State Highway Department of Georgia against Durwood T. Pye, appellant, as *parcel 37, colored in yellow* on attached plans, allegat-

Said affidavit made no reference to the improvements on the land, but in appellant's pleadings it is alleged that the property is the home place of appellant in the City of Atlanta where he and his family reside; *Par. 11, R. 69 and 70; Par. 19(e), R. 82 and 83.*

Appellant filed defenses in the condemnation case, and a separate suit in equity to adjudge it void. State Highway Department filed a motion for possession of the property, to which appellant filed an answer. All pleadings were consolidated in the order and judgment of the Superior Court of Fulton County, Georgia, which denied appellant any relief, struck all his pleadings except as to value and damages, held in substance that the condemnation proceeding was valid, that thereby State Highway Department of Georgia acquired title, and ordered appellant to surrender possession to this Department subject to appeal. This opinion and judgment provided that the only question remaining was the amount constituting just and adequate compensation, and is at *R. 267-278, inc.*

In the pleadings in the equity case appellant set forth that State Highway Department of Georgia had sold his residence and the other improvements on his land to Howard W. Allgood, appellee, subject to acquisition, and under contract for their demolition upon notice and prayed injunctive and other relief. *Par. 17, R. 333-334; Exhibit "B" at R. 372-374; Exhibit "D" at R. 376; Exhibit "E" at R. 377; Par. 22, subpar. (6), R. 340; Pars. 35, 36, and 37, R. 537-538; Pars. 51 and 52, R. 583. Pertinent responses of State Highway De-*

partment appear at Par. 3, R. 448; the contract of sale to Allgood at R. 455-469. The order making appellee Allgood a party is at R. 556.

Appellant alleged in his answer in the condemnation case (Second Defense, subpars. (a) and (b), *R. 119*) and in his pleadings in the separate equity case (Par. 7, *R. 317-318*; Par. 8, subpar. (a), *R. 318*), that said Act of 1961 as amended, pursuant to which the condemnation proceeding was brought, and which authorized condemnation without first paying compensation, in cases of State-aid public road purposes by the State of Georgia, or any division or department or branch of the government of the State of Georgia, or any county of such State (Georgia Laws 1961, pages 517-529), was violative of *Article 1, Section 111, Paragraph 1, of the Constitution of Georgia*, providing in material part: "Private Property shall not be taken, or damaged, for public purposes, without just and adequate compensation being *first* paid."

Appellant contended that the aforesaid Amendment set forth in *Georgia Laws 1961, pages 1225-1227*, was not in fact and law a part of the Constitution of Georgia, in that it was not fairly and lawfully submitted to the electors for acceptance or rejection. This contention was decided adversely to appellant by the Supreme Court of Georgia (Justices Nichols, Felton and Hawes dissenting); and appellant thus relies in the Supreme Court of the United States upon the controlling questions of Federal Law raised by him and decided against him both by the Superior Court and the Supreme Court of Georgia, viz: *that said Amendment of the Constitu-*

tion of Georgia denies due process of law and equal protection of the laws, and is thus repugnant to the Fourteenth Amendment of the Constitution of the United States.

Said questions of the repugnancy of said Amendment of the Georgia Constitution to the United States Constitution were raised and determined against the claim of repugnancy, as follows, to-wit:

First

In the *separate equity case* among the grounds of relief against the condemnation proceedings as void, is the following allegation of *par. 9 (R. 321)*, to-wit:

> "9. It is further respectfully averred that if said proposed amendment should be held to be a part of the Constitution of the State of Georgia, same would nevertheless be null and void because contrary to the due process of law and the equal protection of the laws, as guaranteed by the Fourteenth Article of Amendment of the Constitution of the United States in that said Amendment of the Constitution of Georgia authorizes the taking and damaging of private property for public road and street purposes and subordination of compensation to the property owner to the payment of the bonded indebtedness of the State, county or municipality taking or damaging the same."

In the preceding *par. 8, subpar. (b)*, in the equity case *(R. 318-319)*, said proposed Amendment of the Georgia Constitution is quoted verbatim.

Said par. 9 is answered by State Highway Department of Georgia in *par.* IX of its answer, at *R. 489-490.*

Par. 27 of appellant's Second Amendment in the equity case *(R. 391)*; is as follows, to-wit:

> "27. (Amendatory of Paragraph 9). Paragraph 9 is amended by adding thereto the following to be known as Paragraph 9(a), to-wit: "The subordination of payment for private property taken by the exercise of the power of eminent domain, to the payment of bonded indebtedness, is without reasonable basis, there being no reasonable consideration to support giving bonded indebtedness a priority to payment for private property thus taken by the exercise of the power of eminent domain; and thus there is a denial of equal protection of the laws."

Second

In *appellant's answer in the condemnation case, Second Defense*, appellant moved to dismiss the condemnation case on stated grounds, the ground alleged in *subpar. (d) (R. 119)*, being as follows, to-wit:

> "(d) If said proposed amendment was ratified, it is null and void because violative of the

> equal protection clause of the Fourteenth Amendment of the United States Constitution, as set forth in par. 9 of said complaint, and in par. 9(a) thereof (Second Amendment, Par. 27)."

"Said complaint," as referred to in *subpar. (d)*, is stated at *R. 118*, where said Second Defense commences, to be, "the complaint and four amendments filed in this court in Civil Case No. B-43,979, same being a complaint in the nature of a bill in equity brought by this defendant against the State Highway Department of Georgia . . . ."

In appellant's Sixth Defense in said condemnation case, he alleged:

> "Sixth Defense. Defendant pleads defensively all the matters and things above referred to." *R. 120-121.*

This Sixth Defense thus pleads defensively the allegations of the motion to dismiss contained in the Second Defense including subpar. (d).

In appellant's Thirteenth Defense in the condemnation case, it is alleged:

> "Thirteenth Defense. Defendant pleads defensively each and every matter and thing of law and of fact alleged and set forth by him in his said complaint in case no. B-43,979." (*R. 122*)

This Thirteenth Defense thus includes the allegations of the equity case above referred to under "*First.*"

Third

Appellant in his *answer to the motion of State Highway Department for possession* alleged in *subpar. (d) of Par. "Second,"* as follows, to-wit:

> "(d) If said proposed amendment was ratified, it is null and void because violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, as set forth in par. 9 of said complaint, and in par. 9(a) thereof (Second Amendment, par. 27), all of which are made a part thereof." *R. 58.*

The said motion of State Highway Department for an order requiring appellant "to surrender to condemnor the possession of the lands described" is at *R. 51-52-53.*

Fourth

The Superior Court held in *par. 5 of its Final Conclusions of Law (R. 277)*, as follows, to-wit:

> "5. The Court finds, and so holds, that the last referred to Amendment to the Constitution of Georgia does not violate or offend the 14th Amendment to the Constitution of the United States for any reason assigned in this case."

The preceding par. 4 of said Final Conclusions of Law refers to "The Constitutional Amendment of 1960 to Article 1, Section 111, Paragraph 1 of the Constitution of Georgia, (2-301), Georgia Laws 1960, page 1225." *(R. 276)*

Fifth

In appellant's Enumerations of Error filed in the Supreme Court of Georgia, the aforesaid ruling of the Superior Court referred to in "Fourth" above is enumerated as error, as follows, to-wit:

> "(b) The Court erred in holding that said proposed Amendment is not violative of the 14th Amendment of the Constitution of the United States." *(R. 846)*

(E)

The Federal Questions Are Substantial.

That no State shall deprive any person of property without due process of law is a right which extends to the exercise by the State of the power of eminent domain *to the extent that the law of the State taking private property for public purposes must make reasonable provision for prompt payment of compensation. The United States Constitution does not require that payment be made in advance of taking; but payment must be secured by the same law which takes.*

Thus it is that the *Amendment* of *Article 1, Section 111, Paragraph 1,* of the Georgia Constitution, is repugnant to the guarantee of *due process.* Said Amendment authorizing taking and damaging private property before payment of compensation as ascertained after notice and hearing, when such taking or damaging is for public road and street purposes, and by the State and the counties and municipalities of the State, does not make reasonable provision for prompt payment, but impedes prompt payment by subordinating payment for the property taken to the payment of bonded indebtedness.

In the context of the Amendment the following are provided: *1st:* Payment need not precede taking; *2nd:* Payment need not be made until the same has been finally fixed and determined as provided by law; *3rd:* Then, but *only* then, is payment *required* to be made; *4th:* Then, payment shall be made *in preference to all other obligations except bonded indebtedness.*

The Amendment not only provides for taking and damaging in advance of payment, but relegates the property owner to the status of a *creditor with a claim of secondary priority.*

Sweet v. Rechel
159 U.S. 380
Chicago, Burlington and Quincey Railroad Co. v. Chicago
166 U.S. 226
Backus v. Fort Street Union Depot Co.,
169 U.S. 557

Cherokee Nation v. Kansas Railway Co.
135 U.S. 641
Kennedy v. Indianapolis
103 U.S. 599
Bragg v. Weaver
251 U.S. 57
Crozier v. Fried, Krupp Aktiengesellschaft
224 U.S. 290

Additionally, the provision for subordination to the payment of bonded indebtedness, denies the equal protection of the laws, there being no reasonable basis for classifying bonded indebtedness as entitled to payment before payment for private property taken by the power of eminent domain for public road and street purposes.

See, Mayflower Farms, Inc. v. Ten Eyck, Commissioner etc., 297 U.S. 266, where, *at page 274*, the Court said:

> "The challenged provision is .... not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business ..... The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. *In the absence of any such showing, we have no right to conjure up possible situations which*

might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

See, also:

Morey v. Doud
354 U.S. 457

The provision for subordination to payment of bonded indebtedness not only establishes a limitation *against* the owner of the property taken, but creates a right in *favor* of the holders of the bonds issued for such bonded indebtedness, and disables, by the Fundamental Law of the State, the officers of the State, and the counties and municipalities, from payment of compensation for property taken for public road and street purposes except in subordination to such bonded indebtedness.

The holders of the bonds are protected by the Obligation of Contract Clause of the United States Constitution, *Article I, Section X.* This does not prevent appropriate protective State law, but the State *may not take that which is due the property owner for his property taken, and convert it in whole or in part to the payment of such bonds.* This is what the subordination clause does, and thereby equal protection of the laws as well as due process of law is denied.

The last sentence of the Amendment, providing, "The General Assembly may by law require the condemnor

to make prepayment against adequate compensation.....", is insufficient to assure due process and equal protection, because:

(a) This is merely permissive and not mandatory;

(b) When prepayment is required by the General Assembly, it is merely against adequate compensation, and the balance of compensation is payable only as provided by the preceding portion of the Amendment, and subject to the payment of bonded indebtedness;

(c) The Amendment is entire and indivisible.

The provision for subordination to bonded indebtedness infects and destroys the entire Amendment. Nothing can be saved from the wreck and ruin thereof. True, there is no provision in Georgia to take property in advance of payment, but such is expressly authorized by *Article 1, Section III, Paragraph II* of the Constitution of the State of Georgia.

Under these circumstances, appellant has no standing to attack the Amendment, for without it, his property cannot be taken in this proceeding.

The Supreme Court of the United States has no jurisdiction to determine that the Amendment is entire, or that the provision for subordination to bonded indebtedness is not severable.

the due process of law and equal protection of laws clauses of the Fourteenth Amendment of the Constitution of the United States.

> Par. 9 of equity case, R. 321; Par. 27 in equity case, R. 391; Second defense in condemnation case, subpar. (d), R. 119; Answer to motion for possession, Par. 2, subpar. (d), R. 58.

Both the decision of the Superior Court, and that of the Supreme Court of Georgia, were in favor of the validity of said Amendment of the Georgia Constitution.

> See, R. 277 for ruling of Superior Court on this issue; the entire opinion and judgment are appended; Judgment of the Supreme Court of Georgia is appended, and is at R. 930; Majority opinion of the Supreme Court of Georgia is appended, and the portions relating directly hereto are headnote 1 at R. 861, Division 1 at R. 867-874, subdivision b of Division 1, at R. 874.

Thus the Supreme Court of the United States has jurisdiction on appeal by said *Section 1257 (2) of 28 U.S.C.*

2. *Chicago, Burlington etc. v. Chicago, 166 U.S. 226,* sustains the jurisdiction. At *page 241* the ruling was stated: "In our opinion, a judgment of a State Court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured

to the owner is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument."

Under this principle, the Amendment of the Georgia Constitution is wanting in due process of law because it authorizes the taking and damaging of private property without compensation being made or being secured, the provisions for payment subordinate to the payment of bonded indebtedness being insufficient to reasonably secure payment to the property owner.

3. The rule of *Backus v. Fort Street Union Depot Co., 169 U.S. 557*, sustains the jurisdiction. At *page 565* it was ruled:

> "Inasmuch as the respondents, both on the trial in the circuit court and in the subsequent proceedings on the certiorari in the Supreme Court, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this Court is not open to doubt ..... It is also not open to further debate, since the decision in *Burlington and Quincey Railroad v. Chicago, 166 U.S. 226*, that this Court may examine proceedings had in a State Court under State authority, for the appropriation of private property to public purposes, so far as to inquire whether that court

prescribed any rule of law in disregard of the owner's right to just compensation."

When the Superior Court and the Supreme Court of Georgia upheld the validity of said Amendment, a rule of law was prescribed in disregard of appellant's right to just compensation, that is compensation paid within a reasonable time after taking.

4. In *Kaukana Water Power Co. v. Green Bay and Mississippi Canal Co., 142 U.S. 254, at page 269* it was held: "Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, *if an adjudication of such question were necessarily involved in the disposition of the case by the State courts.* (cits.)."

Although appellant is not compelled to rely upon this principle, for the Federal Questions were raised and decided, this principle is applicable as follows: Under Georgia law the condemnation proceeding could not have been maintained without just and adequate compensation being *first* paid. The Amendment is necessary to sustain the condemnation proceedings. When these proceedings were sustained by the Supreme

Court of Georgia, that Court necessarily decided in favor of the validity of the Amendment.

5. Reference is now made especially to the particular facts of the instant case:

(a)

State Highway Department of Georgia condemned appellant's residence in the City of Atlanta, Georgia, pursuant to the Act approved April 5, 1961, Georgia Laws 1961, pages 517-529, as amended. This Act authorizes taking private property for State-aid public-road purposes without first paying just and adequate compensation therefor and is authorized *exclusively* by said Amendment of the Georgia Constitution. A copy of portions of the Act is appended hereto.

As a part of the condemnation proceeding State Highway Department filed a declaration of taking and paid into court $19,000.00 estimated compensation. Thereupon, State Highway Department acquired the fee simple title to appellant's home.

This estimate of compensation was arrived at without any notice to appellant or opportunity to him to be heard. It did not include any estimate of any damages except market value. It included nothing for appellant's interest in the rear 20 feet.

State Highway Department obtained in the proceeding an order requiring that appellant surrender possession to it.

Thus State Highway Department, under said Constitutional Amendment, said Act pursuant thereto, and the judgments of the Superior Court and the Supreme

Court of Georgia, holding same valid, has acquired fee simple title to the land and improvements, and has the right of possession.

Appellant in the premises has the following rights: Not earlier than 15 days following publication each week for four weeks of notice of the filing of the declaration of taking and the condemnation petition, appellant was authorized to make application to the court for the $19,000.00 and have the same paid to him on account. He was also entitled to apply for the appointment of a special master to require payment into court of additional amounts, and if the master's report so requiring, be approved by the court he was entitled to have such additional amounts paid to him upon giving bond with security in double the sum thereof. Appellant was also authorized to appeal to a jury for ascertainment of just and adequate compensation (which appellant did subject to all his contentions of illegality). Following the jury trial either party, State Highway Department or appellant, is authorized "to move for a new trial and file a brief of exceptions as in other cases at law."

When just and adequate compensation "has been finally fixed and determined as provided by law", i.e., after jury trial, and disposition of any motion for new trial by State Highway Department or appellant, and after new trial if such be granted, etc., *then*, at that stage, appellant "shall then be paid in preference to all other obligations *except bonded indebtedness*."

The road to payment is so long and rocky, and so filled with obstacles, as to deny due process of law. All that appellant can surely and safely rely on being

paid, is said $19,000.00, estimated ex parte, and not even including anything for the rear 20 feet.

The subordination to bonded indebtedness also denies equal protection of the laws. Appended hereto are statements of bonded indebtedness of the State of Georgia, (Appendix G); and illustrations of bonded indebtedness of the counties and municipalities by reference to Fulton County and the City of Atlanta. (Appendices H and I).

It will be noted that the items of bonded indebtedness of the State of Georgia referred to aggregate $1,198,754,000.00, and $853,392,000.00 outstanding as of March 2, 1970, which latter amount includes an item of $254,943,000. Georgia Highway Authority bonds outstanding March 2, 1970. The Highway Authority bonds are for roads and bridges (See the Act approved April 4, 1967, Georgia Laws 1967, pages 385-410, inc.). Certainly bonds sold for this purpose cannot reasonably be said to be entitled to priority of payment over just and adequate compensation for the taking by eminent domain of the land of the citizen whereon he and his family reside.

It will be noted that one item of bonded indebtedness of City of Atlanta and Fulton County is $16,410,000.00 Atlanta and Fulton County Recreation Authority bonds. See Appendix H. These bonds are issued pursuant to the Act approved March 17, 1960, Georgia Laws 1960, pages 2848 through 2853, inc., as amended, and are for the purposes of constructing, maintaining and operating an athletic stadium and field, including "refreshment stands, and restaurants, and facilities for the purveying of foods, beverages, publications, sou-

venirs, novelties and goods of all kinds," etc. (See, Act approved January 20, 1966, Georgia Laws 1966, pages 2848 through 2853). These purposes, though doubtless worthy, do not justify providing by the Constitution of the State that bonds issued therefor shall have priority of payment over payment for the property of the citizen taken for public road and street purposes.

(b)

The Constitutional Amendment being invalid in its entirety for want of due process and equal protection of the laws, cannot support the Act of 1961 pursuant to which appellant's property is taken. This is upon the construction of the Constitutional Amendment that it is not self-executing, and in conformity with par. 1 of the condemnation proceeding, which alleges it is brought under the Act of 1961. If the Constitutional Amendment is self-executing to the extent that it is a direct grant of power requiring no implementation by the General Assembly, its repugnancy to the United States Constitution is equally manifest.

CONCLUSION

Wherefore, the judgment of the Court is prayed.

Respectfully submitted,

_____

Appellant
Pro Se

APPENDIX A

FULTON SUPERIOR COURT

CIVIL CASE No. B-43838

Condemnation Of Land Proceedings

STATE HIGHWAY DEPARTMENT OF GEORGIA

versus

0.413 ACRES OF LAND; and
DURWOOD T. PYE, Individually

CIVIL CASE No. B-43979

Complaint In Nature Of Petition For Equitable Relief

DURWOOD T. PYE

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA

ORDER AND JUDGMENT OF THE COURT

The above-stated cases coming on for hearing and decision by the Court, and after having considered all the pleadings for both parties; having heard the evidence offered on behalf of said parties as well as

all arguments presented and having considered the Briefs of Law submitted by both of said parties; it is considered, ordered, and adjudged by the Court, as follows:

The above-stated cases are between the same parties and involve identical issues. Both of said parties, in their pleadings, as well as in oral statements made to the Court, which appear in the Transcript of Record, have agreed to the consolidation of the stated cases. The Court orders, therefore, that said cases be consolidated for every purpose of this Order and Judgment, for the Appeal thereof; and the rulings made hereinafter will apply to both of said cases with equal force and effect.

A.

The State Highway Department of Georgia is the Condemnor in Civil Case No. B-43838, supra, and is the defendant in Civil Case No. B-43979. Such party, for every purpose of this Order and Judgment, will be designated as "the Condemnor".

B.

Durwood T. Pye is the Condemnee in said Civil Case No. B-43838, and is the plaintiff in said Civil Case No. B-43979, and such party will be referred to and designated in this Order and Judgment, for every purpose thereof, as "the Condemnee".

C.

The "Tenth Amendment" of said Condemnee to Civil Case No. B-43979 is an action in tort by the said Condemnee against the State Highway Department of Georgia, which is not permitted by the Laws and Constitution of this State, and the Motion Of Condemnor to Dismiss and Strike such Amtndment is hereby sustained. (See *Roberts* v. *Barrick*, 187 Ga., p. 691; and *Townsel* v. *State Highway Department*, 180 Ga., p. 112.)

D.

Under the provisions of the last paragraph of Section 36-1303, the State Highway Department of Georgia has applied to the Court for possession of the property of the Condemnee, the same having been delayed because of the several hearings as to both fact and law. Such Order of Possession is now granted, but, it being provided in said Code Section that the Court shall have the power to fix the terms upon which such possession shall be surrendered by the Condemnee to the Condemnor, such terms are provided, as follows:

1. The Court certifies that the questions involved in this Order and Judgment, throughout its entirety, are of sufficient importance to authorize a direct Appeal from this Order and Judgment to the proper Appellate Court;

2. If the said Condemnee shall desire to take a direct Appeal from this Order and Judgment to the proper Appellate Court, and shall file

his Notice Of Appeal within thirty (30) days from the date of this Order and Judgment, or such extension thereof as may be granted to him by the Court in accordance with the provisions of applicable Law, this Order granting possession of said property to the State Highway Department shall not become effective until such time as the proper Appellate Court has made and entered up a decision in respect to this Order in favor of the State Highway Department of Georgia, and the Remittitur from such Court has been made the Judgment of Fulton Superior Court; and, if such Judgment of said Appellate Court shall hold that this Condemnation Proceeding is not a valid, lawful, and Constitutional exercise of the power of Eminent Domain, by the State Highway Department, this Order of Possession shall be null and void;

3. If the said Condemnee shall fail to exercise his right of Appeal from this Order and Judgment, the right of possession of the State Highway Department in and to the property described in the Condemnation Proceedings in Civil Case No. B-43838, as well as in Civil Case No. B-43979, shall vest in the State Highway Department of Georgia as of the date when the time for such Appeal expires under the provisions of Law;

4. Until such time as there has been a final Judgment upon the questions herein involved,

2.

The property of the Condemnee, being condemned in the aforesaid Civil Case No. B-43838, is located entirely within the right-of-way of said State Route 400 in Fulton County, also known by said Project No. F-056-1 (12); and the entire property of such Condemnee, at such location, is necessary to the construction of the said Project, as shown by the evidence and the plats or maps or plans attached to and made a part of the said Condemnation Proceedings.

3.

The Court finds that, in full compliance with the provisions of applicable law, the Director of the State Highway Department of Georgia made and entered up his Order, which appears both as an attachment to the Condemnation Proceedings in said Civil Case No. B-43838 and in the evidence, declaring the determination of the State Highway Department of Georgia to construct the aforesaid highway and Project and that the property of the said Condemnee, as described in said Condemnation Proceedings, is necessary to the construction of such highway and Project. The Court further finds that, in bringing, filing, and maintaining said Condemnation Proceeding in said Civil Case No. B-43838, the Condemnor observed and complied with all conditions precedent, and that the said Condemnation Proceeding is a valid and lawful exercise of the power of Eminent Domain. (See Chapter 36-13 of Georgia Code Annotated, as it appears in the pocket parts of the Code; Georgia Laws 1961, pp. 517, 520; 1962

September-October Extra-Ordinary Session, pp. 37, 44; Georgia Laws 1963, pp. 3 et. seq., Ga. Laws 1963, p. 124.)

CONCLUSIONS OF LAW

The Constitution of this State, Article V, Section XI, Paragraph I, (2-3506 in pocket parts of the Code); provides as follows:

> "The General Assembly shall define by Law the powers, duties, qualifications and compensation of the Board AND OF THE DIRECTOR". (Emphasis ours)

The Court finds, that, at the same Session of the General Assembly which proposed the aforesaid Constitutional Amendment, such General Assembly created a new State Highway Board, and vested all powers of such Board in the Director of the State Highway Department of Georgia, which office was also created by said Statute, except when such State Highway Board was in regular or called session. (Georgia Laws 1963, p. 3 et. seq.). The same Session of the General Assembly vested all powers in respect to the exercise of the power of Eminent Domain, on behalf of the State Highway Department of Georgia in the Director of the State Highway Department of Georgia. (See Georgia Laws 1963, p. 124).

While the aforesaid Constitutional Amendment was proposed by the same session of the General Assembly, (the 1963 Regular Session, Georgia Laws 1963, p. 665),

and was not ratified until the General Election of 1964, the Court rules that, where there is no conflict between a prior Statute and a subsequent Constitutional Amendment, the Statute is not invalidated by such Constitutional Amendment. (See McCollum v. Bass, 201 Ga., at bottom of page 538, and top of page 539.)

The Court concludes, therefore, that the exclusive authority to fix the powers and duties of the Director of the State Highway Department of Georgia is vested in the General Assembly of Georgia. Any action of the State Highway Board, purporting to limit the powers and duties of the Director of the State Highway Department, in violation of a Statute fixing such powers and duties, would be in violation of the aforesaid provision of the Constitution and a nullity. The only lawful construction which can be placed upon the Resolution of the State Highway Board, set forth as Exhibit B to the Answers of Condemnor to the Interrogatories of the Condemnee, dated July 4, 1969, is that it undertook to ratify and confirm the powers of the Director of the State Highway Department and bestow additional powers, over and above those provided by the Acts of the General Assembly.

At the same 1963 Session of the General Assembly of Georgia, that Body vested the procedural power of Eminent Domain under the provisions of Chapter 36-13 of the Code, in the Director of the State Highway Department of Georgia, providing that he should issue an Order, finding that circumstances are such that it is necessary to proceed in the particular case under the provisions of this Chapter, and specifically auth-

orizing condemnations under the provisions of this Chapter; and further providing that his Order shall be conclusive as to the use of the property condemned, as well as the authority to condemn under the provisions of this Chapter. (See Code Section 36-1301, pocket parts, and Georgia Laws 1963, p. 124); and see the Constitutional provision, as hereinbefore cited, and which is codified as Section 2-3506 in the pocket parts of the Code.)

The Court holds, therefore, that there is no conflict between this delegation of authority by the General Assembly to the Director of the State Highway Department of Georgia and the aforesaid Constitutional Provision providing that the General Assembly shall fix his powers and duties; but that, on the contrary, the said Constitutional provision serves to ratify and confirm such powers and duties. Furthermore, that the powers and duties being fixed by Statute in accordance with the provisions of the Constitution, the Court holds that the Director of the State Highway Department of Georgia needs no authority or delegation of power from the State Highway Board in order to perform and exercise such powers and duties; and that the only effect of Georgia Laws 1968, pp. 1055, 1056, is to authorize the State Highway Board to delegate to the Director of the State Highway Department of Georgia such additional powers and duties, in its discretion, as are not fixed by Statute. The State Highway Board could in no way alter or change a delegation of authority to the Director of the State Highway Department, which had been vested in him by the General

Assembly in accordance with the mandate of the Constitution.

The Condemnee having amended his petition in Civil Case No. B-43979 thirteen times, and having filed an Answer and seven Amendments to the Condemnation Proceedings, Civil Case No. B-43838; and the Condemnor having previously filed in Civil Case No. B-43979 its Motion To Dismiss The Petition Of The Condemnee in said case for failure to state a claim upon which relief can be granted, and this Motion having now been amended so as to make it applicable to the original petition of said Condemnee together with the said thirteen Amendments to such petition; and the Condemnor having previously filed its Motion To Dismiss all pleadings of the Condemnee in Civil Case No. B-43838, except insofar as such pleadings relate to questions of value to be determined by the jury on the appeal of the said Condemnee to a jury in said case; and the Condemnor now moving the Court to consider such Motions under the provisions of sub-paragraph (2) of sub-paragraph (H) of Code Section 81 A-112, Georgia Laws 1966, pp. 609, 622, and 1967, pp. 226, 231; such Motions are taken into consideration and construed together, for every purpose of this Order in respect to the pleadings of the Condemnee in both of said cases, as now consolidated. The pleadings of the Condemnee, being identical in both of said described cases, as to the questions of Law, Equity and the Constitution sought to be raised, except for the Tenth Amendment to Condemnee's pleadings in Civil Case No. B-43979, which has been dismissed by a previous provision of this Order, on the grounds stated, and except for the efforts

of the Condemnee in Civil Case No. B-43979 to have Howard W. Allgood made a party to that case, and who has been retained as a party for the sole purpose as hereinbefore stated in this Order, such Motions Of the Condemnor to Dismiss Civil Case No. B-43979, together with the petition and all Amendments thereto, is now consolidated with Condemnor's Motion To Dismiss The Answer of the Condemnee, together with all Amendments thereto, in Civil Case No. B-43838, on the grounds that the last stated Motion is addressed to the identical questions of Law, Equity, and the Constitution, as were raised by the Condemnee in said Civil Case No. B-43979, except insofar as the said pleadings of the Condemnee in Civil Case No. B-43838 relates to questions of value to be determined by the jury on the appeal of the said Condemnee to a jury in said Civil Case No. B-43838; and such Motions are sustained except insofar as Condemnee's pleadings in Civil Case No. B-43838 relate to questions of value to be determined by the jury on Condemnee's Appeal in said case.

FINAL CONCLUSIONS OF LAW

1.

Under the evidence, as hereinbefore set out and referred to, the subject highway was lawfully established and designated as a state-aid road; and the condemnation proceeding is held to be a valid, lawful, and constitutional exercise of the power of eminent domain by the State Highway Department and the Director thereof. (See *Owens, et al. v. State Highway Department*, 113 Ga. App., at p. 611).

2.

The Court holds that the Declaration of Necessity, as set forth in the Order of the Director of the State Highway Department of Georgia, which is a part of the condemnation proceedings in Civil Case No. B-43838, is a lawful and valid exercise of the powers of such Director, as delegated to him by the General Assembly of Georgia; and that such Order is final and conclusive as to the use of the property being condemned, as well as the authority to condemn under the provisions of Chapter 36-13 of Georgia Code Annotated. (See *State Highway Dept.* v. *Respess*, 111 Ga. App., at p. 423.)

3.

The Court rules that the fact that the Condemnor might have condemned the subject property in Civil Case No. B-43838 under some other procedure provided by law does not invalidate the present condemnation proceedings in said case. (See *State Highway Dept.* v. *Respess*, 111 Ga. App., at bottom of page 423.)

4.

The Constitutional Amendment of 1960 to Article I, Section III, Paragraph I of the Constitution of Georgia, (2-301), Georgia Laws 1960, p. 1225, was adopted in strict compliance with the provisions of the Constitution and Laws of this State, and the same is now a part of the Constitution of the State of Georgia. (See the said Constitutional Amendment, codified as Sec-

tion 2-301 of the Constitution, as the same appears in the pocket parts of Georgia Code Annotated.) The Court holds, therefore, that the said Constitutional Amendment is not invalid for any reason assigned. (Article XIII, Section I, Paragraph I of the Constitution, as set forth in Section 2-8101 in pocket parts of Code; *Clements* v. *Powell*, 155 Ga. 278; *Cooney* v. *Foote*, 142 Ga. 647, et. seq.; *Hammond* v. *Clarke*, 136 Ga., at pp. 320, 321; *Madronah Sales Co.* v. *Wilburn*, 180 Ga. (1), at p. 838; and *Sego* v. *Richmond County*, 218 Ga. at p. 157; and *McLennan* v. *Aldredge*, 223 Ga., p. 879, with particular reference to the case of *Cooney* v. *Foote*, 142 Ga., which was cited and quoted in that case.

5.

The Court finds, and so holds, that the last referred to Amendment to the Constitution of Georgia does not violate or offend the 14th Amendment to the Constitution of the United States for any reason assigned in this case.

6.

The Court holds that Georgia Laws 1955, pp. 559-564. (Chapter 95-17A of Georgia Code Annotated), is not unconstitutional for any reason assigned in this case. The Court holds that such Act of the General Assembly does not violate any provision of the Constitution of Georgia or of the United States. The Court further holds that the condemnation proceedings, as hereinbefore stated in Civil Case No. B-43838, is authorized by the general power of Eminent Domain, the exercise

of which is authorized by the Statutes and provision of the Constitution as hereinbefore cited. (See *Barrett* v. *State Highway Dept. of Georgia*, 211 Ga., p. 876.)

7.

The Court finds that the Act of the General Assembly, codified as Georgia Laws 1966, pp. 320, 325, (Section 36-1312 of Georgia Code Annotated, pocket parts), was held to be unconstitutional, null and void, by the Supreme Court of Georgia in the case of *Calhoun* v. *State Highway Dept. of Georgia*, 223 Ga., pp. 65 et. seq., that this decision nullified every provision of said Act, and that the failure of the State Highway Department to comply with a provision of the said Act in no way invalidates the condemnation proceedings in this case, Civil Case No. B-43838.

8.

The prayers of Condemnee that said Condemnation Proceedings in said Civil Case No. B-43838 be declared null and void, and that the Condemnor be restrained from proceeding with the prosecution of said Condemnation Proceedings, are denied. The Court rules that the sole question upon which the condemnee is entitled to be heard is the question of just and adequate compensation for the property being condemned in Civil Case No. B-43838. That question is not now before the Court, but is for determination by a jury in this Court upon the appeal filed by the said condemnee in said case. The Court further holds, therefore, that the said

condemnee has a complete and adequate remedy at Law in said Condemnation Proceedings.

SO ORDERED, this 22nd day of AUGUST, 1969.

(Signed) O. WENDELL HORNE, JR.
O. WENDELL HORNE, JR.,
JUDGE EMERITUS,
Serving In Fulton Superior Court.

APPENDIX B

SUPREME COURT OF GEORGIA

Atlanta, June 8, 1970

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered: Durwood T. Pye v. State Highway Department of Georgia et al. This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur except Nichols, Felton and Hawes, JJ., who dissent.

APPENDIX C

* * * *

1. The trial court properly held that the proposed amendment to Article I, Section III, Paragraph I of the Georgia Constitution (Code Ann. § 2-301) set forth in Georgia Laws 1960, page 1225, became a part of the Constitution, and that it does not violate the United States Constitution.

2. In this condemnation proceeding under Georgia Laws 1961, page 517, as amended, the property owner is not restricted to seeking just and adequate compensation, but may defend upon the grounds set out in section 3 of such Act.

3. The Director of the State Highway Department is authorized to exercise the power of eminent domain under Georgia Laws 1961, page 517, as amended.

4. There is no merit in the contention that this condemnation proceeding is unlawful due to defective certification of the copy of the Director's order of necessity.

5. The several enumerations asserting that this condemnation proceeding cannot be maintained under the 1961 Act, as amended, supra, because of failure of the Department to comply with the conditions precedent of that Act as set forth in section 1 thereof are not valid.

6. A property owner cannot challenge the order of necessity of the Director under the 1961 Act, as amended, supra.

County and embraces the property involved here is known as Project No. F 056-1 (12).

13. The condemnation proceeding was not rendered nugatory by an insufficient description and plat, by an insufficient appraiser's report, or by failure of the Department to pay or offer to pay for moving expenses or access rights.

14. There is no merit in the constitutional attack made upon Georgia Laws 1969, page 492, an Act to authorize acquisition of property for roads in advance of need.

15. The trial court did not err in granting the Department's motion for possession and ordering surrender of the property, conditioned upon the outcome of this appeal.

16. The property owner's tenth amendment to his equitable complaint, alleging damage from the Department's conditional sale of the improvements on his property, was properly dismissed.

17. The trial court correctly limited the case against the defendant Allgood to the time allowed for notice of appeal and the appeal itself.

18. No harmful error occurred by the trial court's holding that the condemnation case and the equity case involve identical issues, pleadings, and questions.

19. The rulings made, supra, are controlling against the property owner as to other contentions, including that as to the sole issue remaining being just and adequate compensation.

Submitted January 14, 1970 — Decided June 8, 1970.

Condemnation of land; constitutional question. Fulton Superior Court. Before Judge Emeritus Horne.

Durwood T. Pye, *pro se*, *P. Russell Tarver*, for appellant.

Arthur K. Bolton, Attorney General, Harold N. Hill, Jr., Executive Assistant Attorney General, Richard L. Chambers, Assistant Attorney General, Marshall Sims, E. Lewis Hansen, E. J. Summerour, for appellees.

Grice, Justice. This appeal is from a judgment in a condemnation proceeding striking all of the property owner's pleadings except as they relate to issues of value.

The proceeding was brought in the Superior Court of Fulton County by the State Highway Department against 0.413 acres of land and Durwood T. Pye, the owner of the land.

The condemnation petition, in substance, alleged as follows: that the proceeding was brought under Georgia Laws 1961, page 517, as amended, to acquire by condemnation fee simple title to the land for a right

of way for a "certain State-aid road (Limited access highway) ... known as Project No. F 056-1 (12), said highway being located as shown on a map and drawing on file in the office of the State Highway Department"; that the Department stands ready to pay just and adequate compensation for the right of way described in the attached declaration of taking and has deposited in the court estimated just compensation ascertained in accordance with Georgia Laws 1961, page 517, as amended; that the right of way and or rights described in the declaration of taking are for State-aid public highway purposes upon the tract of land; that the taxing authorities of the State, county and city may have some claim against the land on account of unpaid State, county and city taxes and are made parties defendant.

Attached to the condemnation petition is an order of the Director of the State Highway Department which avers, in material part, that the Department has laid out and determined to construct a certain State-aid road or highway as a part of the State highway system, known and designated as Project No. F 056-1 (12) Fulton County, described more fully on a map and drawing on file in the office of the Department; that in order to maintain the projected schedule of road construction it is necessary that the right of way be acquired without delay; that the parcel of right of way herein described and listed (as *Parcel* 37, *Owner* Durwood T. Pye, *Taking* 0.413 acres, *Annex* 1 & 1-A) and shown on annexes to this order, is essential for the construction of said project; and that therefore, it is found by the Director that the circumstances are such that it is necessary that the right of way be acquired by

condemnation under the provisions of Georgia Laws 1961, page 517, as amended, and is ordered that the Department proceed to acquire the title in the lands described by condemnation under said Act, and the Attorney General and his assistants are authorized and directed to file condemnation proceedings, including declaration of taking, to acquire it and to deposit in the court the sum estimated as just compensation. This order was signed by the Director of the Department. It was attested by a named person, as Secretary and Treasurer of the Department. This same officer also certified that the order is a true and correct copy of the order entered by the Director in reference to the matters therein described and that the original is on file with the Department.

Attached to the Director's order is a description of the land sought to be condemned and maps or drawings showing a portion of the project which includes the subject property.

The declaration of taking attached to the condemnation petition recited essentially the following: that the Director has entered the order above described; that the Department has caused an investigation and report to be made by a land appraiser upon which to estimate the sum of money to be deposited in the court as just and adequate compensation for the right of way above referred to; that in consequence of the sworn appraisal and report the Department estimates $19,000 as the just and adequate compensation to be paid for the said right of way and now deposits said sum in the court to the use of the persons entitled thereto; and

that therefore, the Department under authority of Georgia Laws 1961, page 517, as amended, hereby declares that the property and or rights described in the Directors' order is taken for State-aid road purposes. This declaration was signed by the Attorney General and several Assistant Attorneys General "by authority of the Director" of the Department.

Also attached to the condemnation petition is the affidavit of an appraiser. It concludes with the statement that he had determined that just compensation is $19,000.

The Department also filed a motion for possession of the property it sought to condemn.

The property owner filed an equitable complaint (case number 43979) with amendments, seeking to have the condemnation proceeding declared void. He also filed an answer to the condemnation proceeding (case number 43838) with amendments, an answer to the Department's motion for possession, and interrogatories to the Department. It is not necessary to set forth these pleadings here, since they will be dealt with in the appropriate divisions of the opinion.

Upon the hearing considerable evidence was adduced. Testimony as to the location and limits of the right of way for the project in question, No. F 056-1 (12), was given by two engineering officials of the Department. Documentary evidence included maps and drawings, minutes of meetings of the State Highway Board, a resolution of that Board, affidavits of

the property owner, and answers of the Department to his interrogatories.

The condemnation proceeding and the equitable complaint were ordered consolidated for purposes of the order and judgment and the appeal.

In its judgment the trial court granted the Department's motion to strike the property owner's amendment to his complaint seeking damages; granted the Department's motion for possession of the property, conditioned on the outcome of this appeal; made findings of fact and conclusions of law; and dismissed all of the property owner's amended pleadings except insofar as they relate to questions of value.

The trial court certified this judgment for immediate review.

This appeal involves numerous issues. There are 27 enumerations of error, with many sub-enumerations and contentions for their support. In treating them, related issues will be grouped and discussed together wherever possible.

1. Initially, the appellant property owner enumerates as error the holding that the proposed amendment to Article I, Section III, Paragraph I of the State Constitution (*Code Ann.* § 2-301), set forth at Georgia Laws 1960, page 1225, became a part of the Constitution.

The proposed amendment provided an exception to the requirement that private property shall not be tak-

en or damaged for public purposes without just and adequate compensation being first paid, where the property is taken for road purposes, in which instance compensation is not required to be paid *until* finally determined as provided by law. It also recites that such payment is subordinated to bonded indebtedness.

The property owner contends that this amendment never became effective and therefore that Georgia Laws 1961, page 517, as amended, under which this condemnation proceeding is brought and which purports to authorize the taking of private property for public purposes without first paying compensation, is unconstitutional.

He maintains that the language used in submission of this proposed amendment to the voters was misleading; that it did not include the gist of the amendment; and that it was insufficient to identify the amendment, to show its character and purpose, or to enable the voters to intelligently pass upon it.

The ballot for this amendment read "For [Against] ratification of amendment to Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes."

The property owner argues that Article I, Section III, Paragraph I already provided for payment and that this proposed amendment, instead of providing for payment as stated on the ballot, in fact took away the requirement that compensation be paid before the taking and made the payment subordinate to bonded

indebtedness, but that the submission language mentioned neither of these features.

(a) This contention as to the form of the ballot cannot be sustained.

When the submission in question took place in 1960 the State Constitution provided that "The General Assembly, in the resolution, shall state the language to be used in submitting the proposed amendment." Art. XIII, Sec. I, Par. I, ratif. Nov. 6, 1956 (*Code Ann.* § 2-3101). No requirements or standards as to the language to be used are stated.

This same provision of the Constitution also required that if the proposed amendment was general, as here, it was "to be published *in full* once each week for three consecutive weeks immediately preceding the date of the election at which such proposed amendment is submitted, in one newspaper of general circulation in each Congressional District of the State." (Emphasis supplied.) Art. XIII, Sec. I, Par. I, supra.

Like questions to the one at bar have been before this court under a similar provision in the 1877 Constitution, and in each it held that the submission language was sufficient.

In this connection, this court said in *Cooney v. Foote*, 142 Ga. 647, 654 (88 SE 537, AC 1916B 1001) (one Justice concurring specially): "Article 13 of the [1877] Constitution did not prescribe the details relating to the manner of submission, but left them to the wisdom

of the legislature. It did provide for the publication of the proposed amendment, as a means of giving wide and extensive information of the exact nature of the proposed change or addition. It was never contemplated that the entire proposed amendment should be printed on the ballot. It was within legislative discretion to adopt some formula by which the voter would express his assent or dissent to the proposed amendment. The formula prescribed by the legislature was not intended for the purpose of informing the voter as to the full contents of the amendment. On the contrary, the formula was intended as the declaration by the voter of his approval or disapproval of the amendment which had been published in each congressional district. The amendment was submitted to the elector, and the formula prescribed was simply to elicit his expression as to whether or not the proposed amendment should become a part of the organic law. The formula written or printed on his ballot was but the legislative means of obtaining his expression upon the published proposal; and when he adopted the formula he indicated his vote upon the whole amendment which was submitted, and not a mere part."

In this same connection, it held in *Goolsby v. Stephens*, 155 Ga. 529, 540 (117 SE 439) (two Justices dissenting upon another ground): "Section 3 of the Act proposing this amendment [to the 1877 Constitution] provides that the entire amendment should be submitted to the electors of the State for ratification or rejection. It was not necessary that the entire amendment should have been printed on the ballots. The reference on the ballots to the proposed amend-

ment is to inform the voters what they are voting for as an amendment to the Constitution; *and such reference is sufficient when it contains enough to enable the voters to ascertain for what amendment they are voting.* When this is done, the voters can be fully informed as to its full provisions by looking to the proposed amendment. What is adopted as an amendment to the Constitution is not what is printed on the ballots, but what is contained in the proposal for amending the Constitution. The submission of the proposed amendment was sufficient." (Emphasis supplied.)

In *McLennan v. Aldredge*, 223 Ga. 879, 882 (159 SE2d 682), the proposed amendment involved a tax for educational purposes. The plaintiff contended that the submission language misled the voters concerning the nature, character and scope of the proposed tax. The opinion quoted from the *Cooney* and *Goolsby* cases, supra, and cited *Townsend v. Smith*, 144 Ga. 792, 796 (87 SE 1039). It then said that there "the ballot was sufficient under the above quoted decisions of this court and the prevailing provisions of the 1877 Constitution ... to inform the voters for what amendment they were voting." P. 883. It distinguished *Seago v. Richmond County*, 218 Ga. 151 (126 SE2d 657), upon the ground that it involved an essentially different amendatory procedure. Georgia Laws 1939, page 305, the basis for that procedure, was nullified by the adoption of the 1956 amendment to Article XIII, Section I, Paragraph I of the Constitution (*Code Ann.* § 2-8101), supra.

Returning to the case now before us, we conclude that the ballot for this amendment is not subject to the attack made. It was sufficient to enable the voters to ascertain that they were voting upon a proposal to amend the Constitution with reference to a feature of payment for taking or damaging private property for road or street purposes, the full text of which had been published three times in each Congressional District.

(b) In this same enumeration the property owner also insists that the provision in the amendment to the effect that compensation for private property taken or damaged shall be subordinate to bonded indebtedness of the condemning authority constitutes denial of the due process and equal protection guaranties of the United States Constitution.

In our view he lacks standing to make this contention. The estimated amount of compensation for taking his property was in fact paid into court. He has not been injured by the subordination provision and therefore does not show any "infringement upon his rights" due to such provision. *Ga. Music Operators Assn. v. City of Atlanta*, 183 Ga. 794 (190 SE 32).

This enumeration is without merit.

2. The property owner raises the issue as to whether, in a condemnation proceeding under Georgia Laws 1961, page 517, as amended (*Code Ann. Ch.* 36-13), he may defend upon grounds of illegality in the taking

or want of essentials, or whether his sole remedy is to seek "just and adequate compensation."

We unhesitatingly hold that the property owner in this situation is not restricted to seeking just and adequate compensation. The 1961 Act, as amended, specifically recites the defenses available to a property owner in a condemnation under the Act and outlines the method of asserting those defenses. Section 3 of the Act provides: "Upon proper pleadings and evidence, under the applicable rules of law, the judge of the superior court shall have the authority to set aside, vacate, and annul the said declaration of taking, together with any title acquired thereby ... The power of the Court in this respect shall not be construed as extending to a determination of questions of necessity, but there shall be a prima facie presumption that the property condemned is taken for and is necessary to the public use provided for in this Act; and such power shall be restricted to the following questions: (a) Fraud or bad faith ... (b) The improper use of the powers of this Act, such as are not contemplated by the provisions of the Act; (c) The abuse or misuse of the powers of the Act; (d) Such other questions as may be properly raised under the provisions of section 8 of this Act [*Code Ann.* § 36-1308], including the question of whether or not the Act has been invoked in some respect beyond the privileges conferred by the Act, or by an unauthorized authority, agency, or governmental subdivision." Ga. L. 1961, pp. 517, 520, as amended (*Code Ann.* § 36-1303). Section 8, referred to above, provides that "All questions of law arising upon the pleadings or in any other way arising from

the cause . . . may be passed on by the presiding judge . . ." Ga. L. 1961, pp. 517, 526 (*Code Ann.* § 36-1308). See also, *State Hwy. Dept. v. McCurdy*, 217 Ga. 731 (124 SE2d 630); *State Hwy. Dept. v. Smith*, 219 Ga. 800, 808 (136 SE2d 334).

In fact, in a condemnation under the 1961 Act, as amended, the property owner is required to set up all available defenses in the condemnation proceeding instead of raising them by a separate suit. *State Hwy. Dept. v. McCurdy*, 217 Ga. 731, 733, supra.

Actually, in the instant condemnation the property owner raised many issues, over and beyond just and adequate compensation. Each of them was considered and passed upon by the trial court before entry of the judgment dismissing those not relating to value. Therefore, the property owner was not deprived of the opportunity of making any defenses.

3. A controlling issue relates to the trial court's holding that the Director of the State Highway Department, rather than the State Highway Board, has the power with respect to the exercise of eminent domain under the 1961 Act, as amended.

At the outset of our discussion of this issue, we quote in the order of their enactment or ratification, the provisions of statutes and the Constitution relevant to this issue.

(i) *Code* § 95-1724: "The State Highway Board, acting for and in behalf of the State, is hereby authorized

and empowered to exercise the right of eminent domain in the condemnation of rights of way and property thereon for the use of the system of State highways ..."

(ii) *Code Ann.* § 95-1715: "... said Highway Department is hereby authorized and empowered to condemn and acquire rights of way for maintaining, improving, and constructing said State-aid roads ..."

(iii) Georgia Laws 1961, pages 517, 520, required that in a condemnation proceeding under that Act there be annexed to the declaration of taking "A certified copy of a *resolution by the State Highway Board* ... finding that the circumstances are such that it is necessary to proceed in the particular case under the provisions of this Act and specifically authorizing condemnation under the provisions of this Act." (Emphasis supplied.)

(iv) Georgia Laws 1963, pages 3, 7 (*Code Ann.* §95-1602(e)), reorganized the State Highway Board, and created the office of Director, "who shall be the chief administrative officer of the ... Department, and who shall possess and exercise all power and authority of the ... Board when it is not in regular or called sessions, with full authority to execute contracts and all other undertakings ..."

(v) Georgia Laws 1963, pages 124-125 (*Code Ann.* § 36-1303), amended Georgia Laws 1961, page 517 (ii, supra), by *substituting* a certified copy of an *order of the Director* for the certified copy of a resolution

of the Board, and specified that "The Director of the ... Department ... shall have, possess and exercise all power and authority conferred upon the ... Board ... in" the 1961 Act, supra.

(vi) Georgia Laws 1963, page 665, proposed an amendment to the Constitution which included the following language: "The Board shall elect a *Director* of the ... Department *who shall be the Chief Executive Officer* of the ... Department ... *The General Assembly shall define by law the powers, duties,* qualifications and compensation of the Board *and of the Director* ..." (Emphasis supplied.) This proposed amendment was ratified November 3, 1964. Art. V, Sec. XI, Par. I (*Code Ann.* § 2-3506).

(a) As to this issue of whether the Director has the power with respect to the exercise of eminent domain, the property owner contends in essence that Georgia Laws 1961, page 517, as amended, does not confer the power of eminent domain upon the Director, but merely gives him authority as to procedure; that the only laws conferring the power to condemn for State-aid roads are *Code Ann.* § 95-1715 and *Code* § 95-1724 (i, ii, supra), which confer such power on the Board; and that Georgia Laws 1963, page 124 (v, supra), should not be construed to confer such power on the Director by implication, since it was expressly conferred on the Board by *Code* § 95-1724.

This contention is not meritorious.

In our view, consideration of the 1963 amendment

to the 1961 Act (v, supra), together with the 1963 Act reorganizing the Highway Board (iv, supra), and the Constitutional amendment (vi, supra) proposed during that same 1963 session of the legislature, leads to the firm conclusion that the General Assembly intended the Director to have the authority to initiate condemnation proceedings under the 1961 Act, as amended.

The Constitutional amendment provided that the General Assembly should define by law the powers and duties of the Director. Art. V, Sec. XI, Par. I (vi, supra). The Act reorganizing the Highway Board made the Director "chief administrative officer" of the Department and gave him *all* power and authority of the Board when it is not in regular or called session. Ga. L. 1963, p. 3, (iv, supra). The 1963 Act amending the 1961 Act, besides providing that the Director shall have all the power and authority conferred on the Board in the 1961 Act, substituted an order of the Director for the previously required resolution of the Board. Ga. L. 1963, p. 124 (v, supra).

Such order of the Director *is the authorization for the particular condemnation.* As to it, section 3 of the 1961 Act, as amended by this 1963 Act, requires that there be annexed to the declaration of taking in a condemnation proceeding under such Act, "A certified copy of an order by the Director of the State Highway Department of Georgia, finding that the circumstances are such that it is necessary to proceed in the particular case under the provisions of this Act *and specifically authorizing condemnation under the provisions of*

this Act." (Emphasis supplied.) Ga. L. 1963, pp. 124-125 (*Code Ann.* § 36-1303(6)).

"By its requirement in the quoted provision, of an order of the Director authorizing condemnation, the General Assembly gave him the power of decision and determination under this Act, and undoubtedly intended that he, rather than the Board, have the power to order condemnation on behalf of the Department under the Act. Whether this power is called the "power of eminent domain" or "power with respect to the exercise of eminent domain," the General Assembly has placed it in the Director insofar as the 1961 Act, as amended, is concerned.

In *State Hwy. Dept. v. Smith*, 219 Ga. 800, supra, this court (one Justice concurring specially) sustained condemnation pleadings under the 1961 Act, as amended, where as here, the Director, not the Board, made the determination to condemn. See also, *State Hwy. Dept. v. Repose*, 111 Ga. App. 421 (142 SE2d 73); s.c. 111 Ga. App. 787 (143 SE2d 434).

(b). The property owner, however, attacks the constitutionality of Georgia Laws 1963, page 124 (v, supra). He urges that the provisions of this statute which authorize the Director, instead of the Board as originally provided by the 1961 Act to proceed under the 1961 Act are inconsistent with the 1964 Constitutional amendment (Art. V, Sec. XI, Par. I; *Code Ann.* §2-3506) (vi, supra), which states that the Director shall be the "Chief Executive Officer" of the Department.

He maintains that the amendment's provision that the General Assembly shall define the powers and duties of the Director contemplated administrative type powers and duties only, and not legislative, governmental and discretionary power, which the 1963 statute purports to authorize.

Also, he urges that the portion of the 1963 statute which recites that the Director shall have all power and authority conferred upon the Board by the 1961 Act violates such amendment in that the latter provides for separate and distinct power and authority of the Board and of the Director; and that the General Assembly cannot delegate to the Director the power of the Board.

Neither of these contentions is valid. The aforesaid amendment to the Constitution provides that the General Assembly shall define the powers and duties of the Director. The two 1963 Acts above discussed did just that, within the limits of that mandate.

It is of no consequence that the 1963 statutes came before the 1964 ratification of the amendment to the Constitution, as there is no conflict between them. See *McCollum v. Bass*, 201 Ga. 537, 538 (40 SE2d 650).

(c) Insofar as the issue of power is concerned, the property owner further insists that Georgia Laws 1968, page 1055, which undertakes to authorize the Board to delegate its authority to the Director, is in violation of the above 1964 amendment to the Constitution (Art. V, Sec. XI, Par. I; vi, supra) in that under the latter

the Board may not delegate its powers to the Director, nor may the General Assembly authorize the Board to do so.

The pertinent part of such Act recites that the Director "shall be the chief administrative officer of the ... Department, and ... shall possess and exercise all power and authority of the ... Board *delegated to him by said Board* when it is not, in regular or called sessions ..." (Emphasis supplied). Ga. L. 1968, pp. 1055, 1056.

We are unable to ascertain the origin of the italicized language, which is what is complained of here. As to this section the 1968 Act states only that it is amending Georgia Laws 1950, page 62, as amended, by deleting the last sentence in subsection (c) of section 4 (*Code Ann.* § 95-1602(c)), "so that when so amended said subsection (c) of section 4 shall read as follows." However, in the restatement of that subsection with the sentence deleted, the above italicized language appears for the first time. There is no indication whatsoever that the General Assembly intended to add these words, and we will assume that they were inadvertently included and therefore are of no effect. This conclusion is preferable to ruling that the Act is unconstitutional due to such words. "It is the duty of courts to put such construction upon statutes, if possible, as to uphold them and carry them into effect." *Lamons v. Yarbrough*, 206 Ga. 50 (2) (55 SE2d 551).

In this same connection, the property owner urges that the resolution of the Board of May 16, 1968, pur-

porting to delegate all of its power to the Director when it is not in session and affirming his prior actions, is an unlawful and ineffective delegation of power to the Director, as only the General Assembly, not the Board, can delegate the power of eminent domain.

This resolution is of no consequence here. The General Assembly, by virtue of the aforesaid 1954 Amendment to the Constitution, was vested with authority to define and fix the powers and duties of the Director, and did so by the two 1963 Acts, supra. By those Acts he already had all of the powers of the Board when it was not in session, and his order of necessity was required to authorize condemnation under the 1961 Act, as amended. No resolution by the Board, even if effective, was necessary to invest him with such power.

(d) The 1961 Act, as amended, in no way repeals the laws (*Code Ann.* § 95-1715 and *Code* § 95-1724) conferring the power of eminent domain on the Board.

We hold, for the reasons stated in this division, that the Director of the State Highway Department of Georgia was authorized to exercise the power of eminent domain so as to acquire the title to private property by the instant condemnation proceeding brought pursuant to the 1961 Act, as amended.

This holding is controlling upon all of the enumerations and contentions relating to the power of eminent domain under this Act, as amended, including the necessity for any action by the Board to authorize this

condemnation, the validity of the Director's order of necessity, and the signing of the declaration of taking by the Attorney General and his assistants "by authority of" the Director.

4. The property owner urges that the condemnation proceeding is unlawful in that no certified copy of the Director's order of necessity to proceed under the 1961 Act, as amended, is attached to the petition, as required by section 3 of such Act. For support of this position he asserts that this document is allegedly certified by the signature of "M. W. Williams, Secretary and Treasurer State Highway Department of Georgia," and that there is no such office or officer created by statute and thus the certificate is not by an officer of this State as required by *Code* § 38-601. This section provides, in material part, that "The certificate ... of any public officer, either of this State or any county thereof, shall give sufficient validity, or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in their respective offices, or pertaining thereto, to admit the same in evidence."

This contention cannot prevail.

A 1950 Act (Ga. L. 1950, pp. 62, 66; *Code Ann.* § 95-1606) created the office of treasurer of the Department and provided that such officer was to be appointed by a majority of the Board. A later Act (Ga. L. 1963, pp. 3, 7; *Code Ann.* § 95-1602 (d).) reorganizing the State Highway Department requires that "the Board [by majority vote] shall also elect a secretary ..."

The Board on November 6, 1961, by resolution, named M. W. Williams Secretary and Treasurer of the Department. As such he was a public officer within the purview of *Code* § 33-601, supra, and thus was authorized to provide the certification for the document in question.

5. Several enumerations assert that this condemnation processing cannot be maintained under the 1961 Act, as amended, because of failure of the Department to comply with the conditions precedent for use of that Act, as set forth in section 1 thereof.

Section 1 of the 1961 Act provides in material part as follows: "Whenever the State ... or any division, department, or branch of the ... State ... or any county ... shall desire to take or damage private property for State-aid public road purposes in pursuance of any law so authorizing, and shall find or believe, concerning which the decision of the condemning authority shall be final and conclusive, that the title of the apparent or presumptive owner of such property is defective, doubtful, incomplete or in controversy; or that there are or may be persons unknown or nonresident who have or may have some claim or demand thereon, or some actual or contingent interest or estate therein; or that there are minors or persons under disability who are or may be interested therein; or that there are taxes due or that should be paid thereon, or shall, for any reason, conclude that it is desirable to have a judicial ascertainment of any question connected with the matter; such State or county may, through any authorized representative, ... file a pro-

ceeding in rem . . . condemning the same to the use of the petitioner upon the payment of just and adequate compensation therefor to the person or persons entitled to such payment." (Emphasis supplied.) Ga. L. 1961, pp. 517, 519 (*Code Ann.* § 36-1301).

The property owner argues that there was no determination as to any of these conditions precedent; that the petition contains no allegations as to them; that the evidence does not show their existence; that these conditions must be determined by the Board and alleged in the order of necessity; and that condemnation under the 1961 Act, as amended, is not authorized without showing the existence of some one or more of these conditions.

We find no defect as to this feature of the condemnation proceeding.

The Director entered an order finding that "the circumstances are such that it is necessary" to condemn under the provisions of the 1961 Act, as amended. The circumstances upon which the condemning authority's finding is based are not required to be set forth in the order of necessity. The condemning authority has only to "find or believe" that one of the several circumstances exists, and upon that alone he may determine to proceed. Furthermore, neither the finding of necessity nor the determination to use the 1961 Act, as amended, rather than a different statute which was employed to condemn nearby property, is subject to challenge or question; and the fact that another procedure might have been employed does not invalidate

this proceeding. See *State Hwy. Dept. v. Smith*, 219 Ga. 800, supra; *State Hwy. Dept. v. Respess*, 111 Ga. App. 421 and 787, supra.

Also, it is immaterial whether this proceeding is authorized by the general power of eminent domain. It was validly brought under the 1961 Act, as amended.

6. Related to the subject matter of the foregoing division, and also to that of Division 2, supra, is the issue, raised in several contentions of the property owner, as to whether he can challenge the necessity for the taking of the property.

Our answer is that he cannot.

The basis for this answer is found in the 1961 Act, as amended, which makes it quite clear that the determination of necessity by the condemning authority is final and conclusive. See section 1 of that Act quoted in Division 5, supra. Also, section 3 requires in a condemnation proceeding under this Act the filing of a declaration of taking which "shall contain or have annexed thereto . . . A certified copy of an order by the Director of the State Highway Department of Georgia, finding that the circumstances are such that it is necessary to proceed in the particular case under the provisions of this Act, and specifically authorizing condemnation under the provisions of this Act," and provides that such order "*shall be conclusive as to the use of the property* condemned, *as well as the authority to condemn* under the provisions of this Act." (Emphasis supplied.) Ga. L. 1961, pp. 517, 520, as amend-

ed (*Code Ann.* § 36-1303). This section further provides that the judge of the superior court shall have authority to set aside the declaration of taking under certain circumstances, but states that "The power of the court in this respect shall not be construed as extending to a determination of questions of necessity, but there shall be a prima facie presumption that the property condemned is taken for and is necessary to the public use provided for in this Act; and such power shall be restricted to the following questions ..." Also, see *State Hwy. Dept. v. Respess*, 111 Ga. App. 421, 423 and 787, 789, supra.

The above ruling does not amount to a holding that the procedure of the 1961 Act, as amended, may be unfairly exercised or that a condemnee might be "singled out" for such procedure, as contended by the property owner. As quoted in Division 2, supra, among the defenses available to property owners under this Act is that of abuse or misuse of the powers of the Act.

7. (a) The property owner contends that Georgia Laws 1962, Extraordinary Session, September-October, pages 37, 38 (*Code Ann.* § 36-1303), which purports to define "State-aid public road purposes" as used in the 1961 Act to include "limited access highways" as provided by Georgia Laws 1955, page 559 (*Code Ann. Ch.* 95-17A), is unconstitutional. He urges that this 1962 Act attempts by legislative construction to change the decision of this court in *State Hwy. Dept. v. Hatcher*, 216 Ga. 299 (127 SE2d 803), contrary to the separation of power provision of the State Constitution (Art. I,

Sec. I, Par. XXIII; *Code Ann.* § 2-123). He also contends that if this 1962 Act adds a class of roads for condemnation, then it is unconstitutional for other reasons, to-wit: as containing more than one subject matter and matter different from the title (Art. III, Sec. VII, Par. VIII; *Code Ann.* § 2-1908); as not describing the law to be amended (Art. III, Sec. VII, Par. XVI; *Code Ann.* § 2-1916); and as being a special law where provision has been made by general law (Art. I, Sec. IV, Par. I; *Code Ann.* § 2-401).

These attacks cannot be sustained.

The 1962 Act, supra, was not an attempt by the legislature to perform the function of construction, which belongs to the judiciary.

In the *Hatcher* case, 218 Ga. 299, supra, this court (two Justices dissenting) held that a proposed limited access interstate highway was not a State-aid highway within the meaning of Georgia law and that property could not be taken under the 1961 Act, supra, for its construction. Appearing in that opinion (p. 302) is this significant language: "Under the 1961 Act the condemnation of private property for public road purposes in the manner therein provided is affirmatively granted only where the land taken is to be used for a State-aid road. If the General Assembly had desired to extend the right and power to condemn under this Act to all roads, it could have done so by omitting the limitation imposed by the words 'State-aid' as applied to public roads."

In the 1962 Act the General Assembly did "extend the right and power to condemn under this Act" to limited access highways as provided by Georgia Laws 1955, page 559. An examination of the body of the Act shows that the General Assembly added to section 3 of the 1961 Act (Ga. L. 1961, p. 517) the following: "The phrase 'State-aid public road purposes,' as used herein, is defined and is to be construed as any public highway of the State established and constructed, or to be constructed, under the provisions of Chapter 95-17 of the Code of Georgia of 1933, under the provisions of Code Section 95-1610, Ga. L. 1951, pp. 31 through 35, and including 'Limited-access Highways', as provided for by chapter 95-17A of the Code, Ga. L. 1955, p. 559, et seq." We regard this as consistent with what was said in the *Hatcher* case, 218 Ga. 299, supra. The words "and is to be construed" in this 1962 amendatory Act are rejected as mere surplusage.

We therefore hold that the 1962 Act, supra, does not offend the separation of powers provision of the State Constitution. Also, it does not add a class of roads for condemnation, and therefore the other constitutional attacks need not be considered.

(b) The property owner further urges that the condemnation proceeding is unlawful in that the declaration of taking does not conform to the petition, since the declaration of taking states the property is being taken for State-aid road purposes while the petition recites it is for a limited access highway, which is not a State-aid road. As to this, he insists that private property cannot be condemned by the procedure of

the 1961 Act, as amended, for a limited access highway as provided by the 1955 Act. Ga. L. 1955, p. 559.

As we appraise them, the allegations of the declaration of taking and the petition are not lacking in conformity. The declaration of taking recites that the property is taken for "State-aid road purposes." The petition alleges at the outset that the action is brought to acquire land for a certain "State-aid road (Limited-access Highway)," and avers subsequently that the right of way and or rights described therein are for "State-aid public highway purposes ..." Examining these documents in their entirety we find no inconsistency. The instant proceeding is brought under the 1961 Act, as amended, and the State-aid road will be a limited access one, as provided by the 1962 Act, supra.

8. The property owner also attacks the validity of the condemnation for State-aid road purposes upon several grounds because none of the provisions of *Code* § 95-1608 were complied with.

This section provides as follows: "The State Highway Engineer shall prepare a report or reports, accompanied by maps, setting forth the roads authorized by law and designated by the State Highway Board as a part of the State-aid system, for approval by the Board. When duly approved by the Board, the maps shall be filed with the Secretary of State as the authoritative record of such State-aid roads, and copies shall be furnished to the counties concerned."

None of the acts set forth in *Code* § 95-1608, supra, are required to be performed before the condemnation can take place, and therefore have no effect upon the validity of this proceeding. See in this connection, *Owens v. State Hwy. Dept.*, 113 Ga. App. 608 (149 SE2d 406).

9. The property owner enumerates as error the trial court's holding that Georgia Laws 1966, page 320, was ruled unconstitutional by this court in *Calhoun v. State Hwy. Dept.*, 223 Ga. 65 (153 SE2d 418), that such decision nullified every provision of said Act, and that failure of the Department to comply with certain provisions of it did not invalidate this condemnation proceeding. In this connection, he insists that the trial court erred in failing to dismiss the proceeding because of omission of the advertisement of the location of the highway and of omission of any allegation in the condemnation proceeding of the date of approval of the original location of the highway, both of which are required by such 1966 Act.

The holding by this court in the *Calhoun* case, 223 Ga. 65, supra, as we appraise it, did nullify the entire 1966 Act, supra, so that compliance with these provisions was not necessary.

The attack made upon the 1966 Act in the *Calhoun* case, that it was "beyond the power of the Central Assembly to specify what evidence can or can not be introduced to prove just and adequate compensation," (p. 68) went to the very heart of that Act. The opinion by this court concluded with the statement

that "the 1966 Act is an attempt to invade the exclusive jurisdiction of the judicial department, it offends the constitutional separation of powers and is therefore void." P. 69.

The provision specifically ruled upon was *not* separable from the remainder of the Act. It is of significance here that the Act does not contain a separability clause. Also of significance is that the advertisement and recital of date of approval were matters required to be performed by the Department in order to implement the main purpose of the Act, which was specifically ruled unconstitutional, to wit, prohibition against consideration of any increase or decrease in the value of the property taken due to the impending condemnation in determining the amount of just and adequate compensation for the property.

10. The property owner maintains that the trial court erred in holding that Georgia Laws 1955, page 559 (the Limited-Access Highway Act), is not unconstitutional for any reason assigned.

He urges that this Act is unconstitutional as follows. (1) It purports to authorize the establishment of limited access highways and to authorize acquisition of land by condemnation without regard to the amount or necessity or desirability and without regard to any limitation of location or to the necessity of preserving sufficient land for homes, agriculture, etc. He says the Act, or at least those portions authorizing condemnation, is therefore vague and indefinite and without any limitation or standard and purport to vest arbri-

trary power in condemning authorities, in violation of our State Constitutional guaranties of equal protection (Art. I, Sec. I, Par. II; *Code Ann.* § 2-102) and due process (Art. I, Sec. I, Par. III; *Code Ann.* §2-103). (2) Section 3 of the Act provides that privately owned and operated "public utilities facilities" may be installed on the property acquired for rights of way of limited access highways, and is so vague and indefinite as to vest arbitrary authority in condemning Authorities, both in violation of Art. I, Sec. III, Par. I (*Code Ann.* § 2-301) and Art. IV, Sec. II, Par. I (*Code Ann.* §2-2501) which limit condemnation to public purposes. (3) Section 5, which allows the condemnor to acquire an entire lot, block or tract if by so doing the interests of the public will be best served even though such entire lot, block or tract is not immediately needed for the right of way proper, violates Art. I, Sec. III, Par. I (*Code Ann.* § 2-301) as permitting condemnation not for public purposes, violates Art. IV, Sec. II, Par. I (*Code Ann.* § 2-2501) as conferring arbitrary authority on condemnors due to the vagueness and indefiniteness of the provision, and violates State equal protection and due process as authorizing acquisition of private property by condemnation for public purposes as same may or may not arise in the future for a highway not already authorized.

Furthermore, the property owner asserts that this 1955 Act is also void as follows: (1) the title contains no reference to exercise of the right of eminent domain or taking of property by condemnation and therefore those portions of the Act authorizing such are violative of Art. III, Sec. VII, Par. VIII (*Code Ann.* § 2-1908)

in that the body contains matter different from the title; and (2) so far as it authorizes taking by condemnation, the Act is void since not limited to acquiring property necessary or reasonably necessary for highway purposes, contrary to Art. I, Sec. III, Par. I (*Code Ann.* § 2-301), Art. IV, Sec. II, Par. I (*Code Ann.* § 2-2501), and to State equal protection and due process.

The property owner has no standing to make some of these attacks. There is no injury to him from the provision allowing the acquisition of extra property not presently needed, as all of his property is within the right of way of the highway to be constructed. Likewise, he is in no position to complain that the Act allows condemnation without regard to necessity or desirability, as the condemning authority has determined both of these features. See Division 6, supra.

His other attacks cannot be sustained. The fact that "the installation of public utility facilities under the rules and regulations of the State Highway Department" are excepted from section 3's prohibition against commercial enterprise or activities within the rights of way acquired for limited access highways does not invalidate the Act. Condemnation of private land for public utility facilities is permitted by the laws of this State (*Code Ch.* 36-7, telegraph companies; *Code Ch.* 36-8, power companies; *Code Ch.* 36-9, waterworks companies; *Code Ann. Ch.* 36-12, pipe line corporations), and we know of no reason why they would not be located, when feasible, on land already taken for necessary rights of way, rather than on additional property taken for that purpose. As to the charge that

the body contains matter different from the title, we find no such defect. The title states among other things that the Act is to authorize the State Highway Department "to acquire land rights, or easements necessary for the establishment of such limited-access highways.

11. The property owner takes the position that the highway in question has not been validly established, located, and laid out, and that the trial court erred in finding that his entire property is within the right of way of such highway and necessary to its construction. He urges that only a vague location has been set, without width or exact location of lanes and other essential features, and also that action by the Board, rather than by the Director, as here, was necessary.

These contentions are not meritorious.

(a) The trial court, from the documents and witnesses before it, was authorized to find that the highway had been located and laid out. Maps and drawings were introduced in evidence showing the location of the highway, and one of the witnesses testified that he could take the maps and locate the highway on the ground.

(b) Also, uncontradicted testimony showed that his property is entirely within the right of way of the highway. The trial court properly held it necessary to the construction since the Director's order had so determined, and, as ruled in Division 6, supra, his finding of necessity is not subject to challenge.

(c) This condemnation for a limited access highway is not void due to an alleged 200 foot width limitation on State-aid roads.

The property owner contends that *Code Ann.* § 95-1715, properly construed, still retains a 200 foot width limitation for State-aid roads. His position is that Georgia Laws 1945, page 258, and Georgia Laws 1953, January Session, page 421, do not remove it, although they make no reference to any limitation. Furthermore, he maintains that if the 1945 and 1953 Acts, supra, do have the result of removing the limitation, they violate certain provisions of the State Contitution, to wit: Art. III, Sec. VII, Par. VIII (*Code Ann.* §2-1908) as containing matter different from what is expressed in the title; and Art. III, Sec. VII, Par. XVI (*Code Ann.* § 2-1916) as lacking description of the alteration to be made in *Code Ann.* § 95-1715, viz.: removal of said width limitation.

To begin with, the 1945 Act, supra, has no place in this discussion. The 1953 Act, supra, repealed *Code Ann.* § 95-1715, as amended by such 1945 Act, and substituted a new section so as to begin it anew.

The new section 95-1715 created by the 1953 Act does not specify any width limitation whatever.

Also, the 1953 Act does not have either of the constitutional infirmities referred to above. It does not contain matter different from what is expressed in the title, which states that it is an Act "*to repeal Section 95-1715* of the official Code, ... as amended by ...

(Georgia Laws 1945, page 248) ... *and to substitute therefor a new section 95-1715* ..." (Emphasis supplied.) Neither does the 1953 Act fail to distinctly describe the alteration to be made of *Code Ann.* § 95-1715. Repeal, not alteration, took place.

It was not necessary for the 1953 Act to mention the Act of 1939 (Ga. L. 1939, p. 187), which substituted a 200 foot width limitation for the original 100 foot one, since such 1939 Act had previously been repealed by the 1945 Act.

In summation, the salient events as to the width provision of *Code Ann.* § 95-1715 are as follows. The original 1919 Act contained a 100 foot width limitation; the 1963 Code adopted the 1919 Act and made that provision *Code* § 95-1715; the 1939 Act amended *Code* § 95-1715 to change the width limitation from 100 feet to 200 feet; the 1945 Act repealed the section as amended by the 1939 Act and enacted a new section without any width limitation; and the 1953 Act repealed the section as amended by the 1945 Act and enacted a new section 95-1715, which also contains no width limitation, and it is the present law.

12. The property owner also asserts that the trial court erred in holding that from the evidence he found State Route 400 was lawfully designated as a State-aid road; and that the portion which lies within Fulton County and embraces the property in question is also known as Project No. F 056-1 (12), a designation given for the purpose of procuring Federal aid in the construction of the highway.

(a) The trial court was amply authorized to find that the subject highway, State Route 400, was lawfully designated as a State-aid road, in compliance with *Code* § 95-1705. There appears in the record a copy of an order of the Director making this proposed highway a part of the State-aid road system and a copy of a letter to the Fulton County Commissioners of Roads and Revenue so notifying them.

(b) The uncontradicted testimony was that the portion of the highway lying in Fulton County and embracing the appellant's property is also known as project No. F-056-1 (12) and that this is a designation given for the purpose of procuring Federal aid.

13. The property owner contends that this condemnation proceeding is rendered nugatory by insufficient description and plat of the property to be taken, by an insufficient appraiser's report and by failure of the Department to pay or offer to pay for moving expenses or access rights.

(a) As to the description, an attachment to the Director's order identified the property as Parcel 37, containing 0.413 acres, and describes it as: "Beginning at a point on the east side of Poplar Circle 210 feet southeastwardly from the southeast corner of Euclid Avenue and Poplar Circle (said beginning point being on the dividing line between lots 146 and 147 of said plat) and running thence eastwardly along said dividing line 210 feet more or less, to a 20-foot reservation; thence northwardly along said reservation 81 feet, more or less; thence westwardly 245 feet, more or

less, to Poplar Circle; thence southwestward along the eastern side of Poplar Circle 87.4 feet, more or less, to the point of beginning; being improved property known as No. 221 (formerly 45) Poplar Circle, N.E., in the City of Atlanta, Georgia ... as shown in yellow" on a certain attached plat.

Also sought to be condemned is whatever right, title and interest the property owner has in the 20 foot reservation mentioned in the above description. This reservation is described as lying "to the rear of, easterly and adjacent to the above described property and which ... is shown as colored in red on the [attached] plat..."

The description given here is sufficient compliance with the 1961 Act, as amended. It provides the metes and bounds of the portion which fronts on Poplar Circle and furnishes a key for its identification. The reservation is also sufficiently set forth.

The plat likewise comports with the law. The 1961 Act, as amended, does not require that the plat contain measurements or distances.

(b) As to the appraisal, the affidavit of the appraiser attached to the condemnation proceeding states, in essence, that he was employed by the Department to appraise parcel 37 of the right of way for Project No. F 056-1 (12) in Fulton County; that he is familiar with real estate values in the county and vicinity; that in appraising he took into consideration the fair market value of the parcel, as well as any

consequential damages to any remaining property of the condemnee by reason of taking the parcel and any consequential benefits to any remaining property by reason of such taking; and that he thus determined that just compensation is $19,000.

The property owner complains that the affidavit states no facts as its basis; that the appraisal recites that consideration was given to consequential damages to remaining property but the entire property was taken; and that the appraisal shows that compensation was determined on the basis of fair market value, which did not include several stated items of damage and therefore is an illegal and unconstitutional basis of value. He also argues that insofar as the twenty foot reservation is concerned, the proceeding seeks to condemn a vague and indefinite interest.

As we evaluate these contentions they are not meritorious.

The legislation under which the condemnation is brought, the 1961 Act, as amended, does not require that the appraisal affidavit recite any factual basis for the amount of estimated compensation. It merely provides that the declaration of taking shall contain or have annexed thereto "A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken, including consequential damages to land not taken, accompanied by a sworn copy as an exhibit of the appraiser's report justifying said sum." Ga. L. 1961, pp. 517, 520, as amended (*Code Ann.* § 36-1303 (5)).

The recitals as to consideration of consequential damages and benefits to land not taken do not invalidate the appraisal. There was no remaining land and hence no amount could have been added or deducted as to this.

As to the complaint that the compensation was determined on the basis of fair market value with no consideration of the stated items of damage, and thus being an illegal and unconstitutional basis of value, the property owner was not precluded by this appraisal. If he was dissatisfied with the amount of the estimated compensation, he had the right under the 1961 Act, as amended, to an interlocutory hearing before a special master on the issue "whether the amount deposited in court as just and adequate compensation is sufficient" (Ga. L. 1961, pp. 517, 526; *Code Ann.* § 36-1309) and also the right to appeal to a jury. Ga. L. 1961, pp. 517, 528 (*Code Ann.* § 36-1310). Upon a trial before a jury the property owner will have the opportunity to introduce evidence in support of all legitimate items of damage that he has suffered. See *Code* § 36-505; Ga. L. 1961, pp. 517, 528 (*Code Ann.* § 36-1310); Ga. L. 1969, p. 495.

As to the 20 foot reservation, the condemnation purports to take whatever interest the property owner has. By reciting that it is condemning whatever interest he has in it, the Department brings that issue in question and acknowledges that it will pay him for any interest he has.

(c) Concerning moving expenses, the property owner asserts that they will be considerable and that there has been no offer to pay them. He contends that since the appraiser's estimate of compensation does not include such expenses, this proceeding violates due process (Art. I, Sec. I, Par. III; *Code Ann.* § 2-103). He also urges that the 1961 Act, as amended, is unconstitutional since it makes no provision for these expenses. He further argues that under Georgia Laws 1969, page 495, he is entitled to payment or offer of these before eviction. He insists that he is entitled to proceed in equity due to the omission of payment or tender of such expenses.

These contentions constitute no valid reason to void the condemnation proceeding.

An exhibit to the property owner's equitable complaint contains a notice by the Department to him offering relocation assistance, and stating that he probably is entitled to some moving expenses under Georgia Laws 1966, page 588 (now repealed and replaced by Georgia Laws 1969, page 495, supra). The property owner will have the opportunity to prove such expenses.

(d) The failure to recite in the Department's condemnation documents that access rights were included in the property condemned is of no consequence. The taking here was of the entire property, which included these rights.

14. The property owner also attacks Georgia Laws 1969, page 492, an Act to authorize the acquisition of property for rights of way or construction or maintenance of roads by the Department in advance of need if the acquisition is part of a specific plan of highway development. He insists that insofar as this Act authorizes exercise of the power of eminent domain for other than necessary public uses, it violates certain provisions of the State Constitution; and if his property is permitted to be taken it will have been taken for other than necessary public uses, particularly since here no highway has in fact been located or established by authority of law.

These attacks must fail due to the property owner's lack of standing to make them. This condemnation is not brought under such 1969 Act and is not one in advance of need. The Director's order here states that in order to maintain the projected schedule of road construction it is necessary that the right of way be acquired without delay, and that the property involved here is essential for the construction of this project. Furthermore, Division 11, supra, holds that the trial court properly found that the highway in question has been located and established and that the property involved here lies within the right of way of such highway. Therefore, the property is being taken for necessary public uses and will not be held in abeyance for a long period of time before actual use.

15. The property owner urges that the trial court erred in granting the motion of the Department for possession and in ordering him to surrender the prop-

erty to it within the time provided in the order, conditioned upon the outcome of this appeal.

In this connection the 1961 Act, as amended, provides in part that "upon the filing of a declaration of taking, the court shall have power to fix the time, the same to be not later than 60 days from the date of the filing of the declaration of taking, as herein provided for, within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner." *Code Ann.* § 36-1303.

The property owner contends that his answer to this motion for possession sets forth good defenses, which were dismissed.

(a) As to this, his answer to the motion contained several questions which he also raised in his answer to the condemnation proceeding or in his complaint in equity, or in both. In fact he refers to his complaint for further detail on most of his contentions. The rulings made on those issues control here.

(b) One contention made in his answer to the motion that was not identically raised elsewhere is that possession should not be ordered because his property is not needed at this time for public highway purposes. He alleges that use of the property is worth $200 a month or more to him, and that the Department has not paid or offered to pay for such use.

On this issue he contends that the provision of *Code Ann.* § 36-1303 (Ga. L. 1961, pp. 517, 520, as amended)

requiring the court to order possession surrendered within 60 days from filing of the declaration of taking violates several provisions of the State Constitution, to-wit: Art. I, Sec. I, Par. XXIII (*Code Ann.* § 2-123) as to separation of powers; Art. I, Sec. I, Par. II (*Code Ann.* § 2-102) as to equal protection; Art. I, Sec. I, Par. III (*Code Ann.* § 2-103) as to due process; and Art. I, Sec. III, Par. I (*Code Ann.* § 2-301) as to just and adequate compensation for private property.

None of these constitutional attacks is valid.

(1) The provision here under consideration does not offend the separation of powers provision. We cannot agree that the time within which possession should be delivered is a judicial, not a legislative, question.

(2) Likewise, it does not deny equal protection, as it applies to all property condemned under this statute.

(3) Neither does it deprive the property owner of due process of law. His property is being condemned for present use. That there will be some interval of time between acquisition and actual construction is inevitable. However, the Director's order states that it is necessary to acquire the right of way without delay in order to maintain the projected schedule of road construction. We cannot say that the requirement of surrender within 60 days of the declaration of taking is arbitrary or capricious.

(4) Nor does this provision deprive him of his property without just and adequate compensation. The lat-

ter, determined as provided by the 1961 Act, as amended, will be paid for the property.

16. The property owner complains of the dismissal of the tenth amendment to his equitable complaint, urging that the trial court erred in holding that the amendment is an action in tort against the State which is not permitted by law.

This amendment alleged in substance that the sale of the residence and other improvements on the property to the defendant Allgood was without authority of law and constitutes a trespass and tortious wrong for which he is entitled to recover nominal and general damages, and prayed for $100 damages. The property owner argues that this sale was damaging within the meaning of the Constitutional provision that just and adequate compensation must be paid when private property is damaged or taken for public purposes. Art. I, Sec. III, Par. I (*Code Ann.* § 2-301).

Whether this amendment was an attempt to sue the Department for a tort or was an allegation as to damaging under the Constitution, no infliction of damages is shown since the sale complained of was *on condition* that the Department acquired title. Therefore, the amendment alleges mere apprehension of injury, for which neither law or equity provides relief.

This enumeration is not meritorious.

17. The holding in the preceding division also controls as to the contention that the trial court erred

in limiting the case against the defendant Allgood to the sole purpose of retaining him as a party defendant during the time allowed for notice of appeal and the appeal itself, during which time he is enjoined from disturbing the property owner.

Under the rulings herein made the only issue left in the case is just and adequate compensation. As to that Allgood does not need to be a party. The trial court properly left him in the case pending the outcome of this appeal, in the event this court should reverse and hold that the property owner is entitled to relief against him.

This contention is without merit.

18. The property owner also maintains that the trial court erred in holding that the condemnation case and the equity case involve identical issues and that the pleadings of the property owner in both cases are identical as to the questions of law, equity and the Constitution sought to be raised, except for his efforts to have the defendant Allgood made a party in the equity case.

He argues that in his defenses and prayers in the condemnation case alone he sought recovery of expenses, costs and damages arising from the proceeding.

This feature is immaterial and is not harmful to the property owner. The trial court considered and ruled upon all of the contentions in both cases.

19. The rulings made in the preceding divisions of this opinion are controlling against the property owner as to other contentions which are broad in scope and need not be set forth fully here.

(a). For this reason, there is no merit in the complaint that the trial court erred in holding that the Department has complied with all conditions precedent in this condemnation proceeding.

(b) The prior rulings are also decisive against the enumeration that the trial court erred in denying the prayers of the property owner that the condemnation proceeding be declared void and also in denying his prayer that the Department be restrained from proceeding with the condemnation.

(c) Likewise, the holdings already made adversely dispose of the contention that the trial court erred in ruling that the sole question upon which the property owner is entitled to be heard is that of just and adequate compensation for the property being condemned, and also in ruling that the proptrty owner has a complete and adequate remedy in the condemnation proceeding.

We find no cause for reversal of the judgment upon which the appeal is predicated.

Judgment affirmed. All the Justices concur, except Nichols, Felton and Hawes, JJ., who dissent.

NICHOLS, Justice, dissenting. I dissent from the first division of the majority opinion, the other divisions necessarily controlled thereby and the judgment of affirmance.

"In the absence of some other exclusive method of determination provided by the Constitution, whether an amendment has been properly proposed and adopted according to the requirements of the existing Constitution and has become a part of the fundamental law of the State, is generally a judicial question." *Hammond v. Clark*, 136 Ga. 313 (1) (71 SE 479, 38 LRA (NS) 77).

I recognize the right of the people to amend the Constitution (the people's Constitution) in almost any conceivable manner so long as the amendments are made in accordance with law. In *Goolsby v. Stephens*, 155 Ga. 529, 540 (117 SE 439), with two Justices dissenting on other grounds, it was held with reference to the ballot submitting a constitutional amendment: "It was not necessary that the entire amendment should have been printed on the ballots. The reference on the ballots to the proposed amendment is to inform the voters what they are voting for as an amendment to the Constitution; and such reference is sufficient *when it contains enough to enable the voters to ascertain for what amendment they are voting.* When this is done, the voters can be fully informed as to its full provisions by looking to the proposed amendment." (Emphasis supplied).

The decision in *Cooney v. Foote*, 142 Ga. 647, 654 (83 SE 537), with one Justice expressly not concurring in all that was said, held: "It was never contemplated that the entire proposed amendment should be printed on the ballot. It was within legislative discretion to adopt some formula by which the voter would express his assent or dissent to the proposed amendment. The formula prescribed by the legislature was not intended for the purpose of informing the voter as to the *full contents* of the amendment. On the contrary, the formula was intended as the declaration by the voter of his approval or disapproval of the amendment which had been published in each congressional district. The amendment was submitted to the elector, and the formula prescribed was simply to elicit his expression as to whether or not the proposed amendment should become a part of the organic law. The formula written or printed on his ballot was but the legislative means of obtaining his expression upon the published proposal; and when he adopted the formula he indicated his vote upon the whole amendment which was submitted, and not a mere part." (Emphasis supplied). In that case the ballot *described* the amendment proposed although of necessity it did not include the entire amendment.

In *Townsend v. Smith*, 144 Ga. 792, 795 (87 SE 1029), with Mr. Chief Justice Fish absent, it was held that while a proposed amendment to the Constitution does not stand on the same footing as an ordinary Act of the General Assembly, yet when a proposed amendment to the Constitution is in the form of an Act, having a caption, it is permissible to look to the caption to

determine what change is intended in the event of an ambiguity.

The proposed amendment here under consideration read as follows:

"A Resolution proposing an amendment to the Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes; to provide for the submission of this amendment for ratification or rejection; and for other purposes."

"Be it resolved by the General Assembly of Georgia:

"Section 1. Article I, Section III, Paragraph I of the Constitution is hereby amended by striking the period at the end thereof and inserting in lieu thereof a comma, and by adding the following language:

" 'except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of

the property owner, lien holders and the State and its subdivision may be protected.' So that when so amended, said Paragraph I shall read as follows:

"'Paragraph I. In case of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid, except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders and the State and its subdivisions may be protected.'

"Section 2. When the above proposed amendment to the Constitution shall have been agreed to by two-thirds of the members elected to each of the two branches of the General Assembly, and the same has been entered on their journals with the 'Ayes' and 'Nays' taken thereon, such proposed amendment shall be published and submitted as provided in Article XIII,

Section I, Paragraph I of the Constitution of Georgia of 1945, as amended.

"The ballot submitting the above proposed amendment shall have written or printed thereon the following:

"'For ratification of amendment to the Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes."

"'Against ratification of amendment to the Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes.'

"All persons desiring to vote in favor of adopting the proposed amendment shall vote for ratification of the amendment, and all persons desiring to vote against the adoption of the proposed amendment shall vote against ratification.'

"If such amendment shall be ratified as provided in said Paragraph of the Constitution, it shall become a part of the Constitution of this State. The returns of the election shall be made in like manner as returns for elections for members of the General Assembly, and it shall be the duty of the Secretary of State to ascertain the result and certify the result to the Governor, who shall issue his proclamation thereon."

Prior to the proposed amendment the Constitution provided "for the payment for the taking or damaging of private property for public road and street purposes." No amendment was necessary to accomplish this purpose. In *Woodside v. City of Atlanta*, 214 Ga. 75 (103 SE2d 108), with dissents as to when a "taking" of private property occurs, it was recognized by all the members of the court as it was then constituted that just and adequate compensation must be first paid.

Thus the caption as well as the ballot proposed to do what was already required. The amendment was for another purpose. It was to provide for an exception. The amendment as originally introduced in the Georgia House of Representatives did not include the second sentence but this was added as an amendment before the same was voted upon. See House Journal, 1960 Session, p. 516.

Under the purported amendment, private property could be physically taken for public road and street purposes and no payment made until years later after the issue as to what constituted just and adequate compensation had been litigated through the court system of the State one or more times. Under the amendment to such purported amendment the General Assembly may, but is not required to, provide for some prepayment as against just and adequate compensation.

At the General Election whereat the proposed amendment was submitted to the electorate, 19 other general amendments and 68 local amendments were also submitted. The local amendments were voted on

in various subdivisions of the State. See Ga. L. 1961, p. 754 et seq. While the amendments are published throughout the State yet the voters have a right to expect that they will not be misled by the General Assembly.

None of the decisions cited by the majority hold that a ballot submitting a constitutional amendment may ask the voter to vote for or against an issue entirely different from the amendment actually proposed.

Under the majority opinion any question proposed by the General Assembly would be sufficient. Under this rationale if two amendments were proposed, one to provide capital punishment for speeding in excess of 2 mph over the posted speed limit and the other homestead exemption for paraplegic war veterans, if the ballots as prescribed by the General Assembly read for or against capital punishment for speeding when referring to the paraplegic war veterans amendment and for or against additional homestead exemptions for paraplegic war veterans when referring to capital punishment for speeding, the results of such election (where one amendment was ratified and the other rejected) would stand.

This is nothing more or less than an abdication of the judicial powers and duties of this court.

Moreover, in *Seago v. Richmond County*, 218 Ga. 151 (126 SE2d 657), it was held that a statute (Ga. L. 1939, p. 305) provided for the Governor to prescribe the language to be used in presenting constitutional amendments to the voters and required that the ballot

state "the nature of the proposed amendment" with the requirement:

"In so preparing the form of the ballot, the Governor shall use such language as will enable the voters to intelligently pass upon any such proposed amendment and intelligently register their votes concerning the same." P. 155. This 1939 Act was not repealed until 1962 (Ga. L. 1962, p. 690). The purported amendment in the case sub judice was placed on the General Election ballot in 1960. Thus is presented the question of the effect of the 1956 constitutional amendment (Ga. L. 1956, p. 637) on the Act of 1939.

Under the decisions exemplified by *McKnight v. City of Decatur*, 200 Ga. 611, 619. (37 SE2d 915), the effect of a constitutional amendment upon a valid existing law is not to repeal the same but to require construction consistent with such amendment. The 1939 Act, supra, insofar as material here, did two things. It (1) placed the duty on the Governor to prepare the ballots submitting constitutional amendments proposed by the General Assembly, and (2) directed how the ballots should be prepared. Properly construing such Act after the 1956 amendment, supra, the duty of preparing the ballot was transferred to the General Assembly but the direction as to how such ballots should be prepared still remained in the statute law of Georgia. Properly construed the *Seago* case is applicable to the present case and the language on the ballot prepared by the General Assembly did not permit "the voters to intelligently pass upon any such proposed amendment and intelligently register their votes concerning the same."

This purported amendment never became a part of the Constitution of Georgia.

I am authorized to state that Mr. Justice Hawes concurs in this dissent.

Felton, Justice, dissenting. Assuming that appellant had standing to attack the adoption of the constitutional amendment I dissent from the judgment of affirmance and the ruling of the court in Division 1. I concur generally in Justice Nichols' dissent but not in all that is stated therein.

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF GEORGIA

CASE No. 25,600

DURWOOD T. PYE,
Appellant,

versus

STATE HIGHWAY DEPARTMENT OF GEORGIA, and HOWARD W. ALLGOOD,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Durwood T. Pye, the appellant above named, hereby appeals to the Supreme

Court of the United States from the final judgment of the Supreme Court of Georgia affirming the judgment of the Superior Court of Fulton County, Georgia, said judgment of the Supreme Court of Georgia having been entered in said condemnation proceedings on June 8, 1970.

Said judgment of the Supreme Court of Georgia is a final judgment in that thereby it was finally adjudged by said Court that the aforesaid condemnation proceedings instituted by State Highway Department of Georgia, appellee, were sufficient to take and condemn appellant's private property, his home in the City of Atlanta, Georgia, and to acquire a fee simple title thereto, for the right of way for a certain State-aid road and limited access highway referred to as Project No. F 056-1 (12); and that the only question remaining was the determination of the amount of money representing just and adequate compensation.

Particularly, Durwood T. Pye, appellant above named, appeals from that part of said judgment, and the opinion of said Court rendered therewith, all entered June 8, 1970, holding valid the proposed Amendment to the Constitution of Georgia set forth in Georgia Laws of 1960, page 1225, and held by the Supreme Court of Georgia in said proceeding to have been validly submitted to the people of the State of Georgia and ratified by them in the General Election held November 8, 1960, and thus a part of the Constitution of Georgia, providing in part in substance that payment of compensation for private property taken or damaged by the State, counties and municipalities, for public

road and street purposes, is subordinated to the payment of bonded indebtedness, the validity of which statute of the State of Georgia was drawn in question by appellant as repugnant to the due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257(2).

H. The Clerk of the Supreme Court of Georgia will please prepare a transcript of the entire record in this cause, including all opinions in the Supreme Court of Georgia, and including the judgment of the Supreme Court of Georgia sought to be reviewed, and including this notice of appeal, and the clerk will please certify the same and provide for its transmission to the Clerk of the Supreme Court of the United States.

Respectfully Submitted,

s/ Durwood T. Pye
Appellant
Address: 801 Fulton County
Courthouse
Atlanta, Georgia 30303

s/ P. Russell Tarver
Attorney for Appellant
Address: 2922 First National
Bank Tower
2 Peachtree Street
Atlanta, Georgia 30303

County of Fulton
State of Georgia

PROOF OF SERVICE

Personally appeared Durwood T. Pye, appellant herein, who deposes and says that on this day of July 8, 1970, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, as follows, to-wit:

(1) Upon Honorable Arthur K. Bolton, The Attorney General of the State of Georgia, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to him at his office, 132 State Judicial Building, Atlanta, Georgia, 30334;

(2) Upon State Highway Department of Georgia, appellee, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Mr. Marshall R. Sims, Deputy Assistant Attorney General, attorney for said State Highway Department of Georgia, appellee, at his office in Griffin, Georgia;

(3) Upon Howard W. Allgood, appellee, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Mr. E. Lewis Hansen, attorney for Howard W. Allgood, appellee, to his office in the Palmer Building, Atlanta, Georgia, 30303.

(Signed) DURWOOD T. PYE
APPELLANT

Sworn to and subscribed before me by Durwood T. Pye, this July 9, 1970.

(Signed) HENRY H. COBB,
Clerk of Supreme Court of Georgia
Notary Public

APPENDIX E

TAKING OF PRIVATE PROPERTY FOR ROAD AND STREET PURPOSES.

Proposed Amendment to the Constitution.
No. 104 (House Resolution No. 300-638).
A Resolution.

Proposing an amendment to the Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes; to provide for the submission of this amendment for ratification or rejection; and for other purposes.

Be it resolved by the General Assembly of Georgia:

Section 1. Article I, Section III, Paragraph I of the Constitution is hereby amended by striking the period

at the end thereof and inserting in lieu thereof a comma, and by adding the following language:

"except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders and the State and its subdivisions may be protected."

so that when so amended, said Paragraph I shall read as follows:

"Paragraph I. In cases of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid, except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law; but such just and adequate compensa-

tion shall then be paid in preference to all other obligations except bonded indebtedness. The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders and the State and its subdivisions may be protected."

Section 2. When the above proposed amendment to the Constitution shall have been agreed to by two-thirds of the members elected to each of the two branches of the General Assembly, and the same has been entered on their journals with the "Ayes" and "Nays" taken thereon, such proposed amendment shall be published and submitted as provided in Article XIII, Section I, Paragraph I of the Constitution of Georgia of 1945, as amended.

The ballot submitting the above proposed amendment shall have written or printed thereon the following:

"For ratification of amendment to the Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes.

"Against ratification of amendment to the Constitution so as to provide for the payment for taking or damaging private property for public road and street purposes."

All persons desiring to vote in favor of adopting the proposed amendment shall vote for ratification of the amendment, and all persons desiring to vote against the adoption of the proposed amendment shall vote against ratification.

If such amendment shall be ratified as provided in said Paragraph of the Constitution, it shall become a part of the Constitution of this State. The returns of the election shall be made in like manner as returns for elections for members of the General Assembly, and it shall be the duty of the Secretary of State to ascertain the result and certify the result to the Governor, who shall issue his proclamation thereon.

Approved March 7, 1960.

APPENDIX F

EXCERPTS FROM THE ACT APPROVED APRIL 5, 1961. GEORGIA LAWS 1961, PAGES 517-529.

Section 3. In any proceeding in any court of the State of Georgia instituted under the provisions of this Act for the acquisition of any land or easement or right of way in land for State aid public road purposes, the petitioner shall file a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the condemnor.

Said declaration of taking shall contain or have annexed thereto:

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken, including consequential damages to land not taken, accompanied by a sworn copy as an exhibit of the appraiser's report justifying said sum.

Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the condemnor and said lands shall be deemed to be condemned and taken for the use of the condemnor, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 7 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, and not earlier than fifteen days subsequent to the date of the last advertisement in the official newspaper of

the county, as provided for in subparagraph 7 of section 5 of this Act, the court shall order that the money deposited in the court be paid forthwith to the parties found to be entitled thereto for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the condemnor for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time, the same to be not later than sixty days from the date of the filing of the declaration of taking, as herein provided for, within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner . . . .

Section 4. No appeal in any cause under this Act nor any bond or undertaking given shall operate to prevent or delay the vesting of title to such lands in the condemnor.

Section 5 . . .

7. In all instances, . . . notice shall be published in said newspaper once each week for four weeks subsequent to the filing of such petition and declaration;

Section 7. No judgment of any court, nor order or ruling of the judge thereof, shall be necessary to give effect to the declaration of taking provided for in sec-

tion 3 of this Act but the same shall be self-executing. If no appeal is filed, as hereinbefore provided for, the condemnor shall, at the next term of the superior court convening not earlier than fifteen days subsequent to the date of the last advertisement in the official newspaper of the county, as provided for in subparagraph 7 of section 5 of this Act, or at any time thereafter, pay all accrued court costs in said case to the clerk of the Superior Court in which the same is pending; at which time, the judge of the Superior Court shall enter up judgment in favor of the condemnee and against the condemnor for the sum of money deposited by the condemnor with the declaration of taking. If such sum has been withdrawn from the court by such condemnee, as provided for in section 3 of this Act, the clerk of the Superior Court shall mark such judgment satisfied; and, if the condemnee has not withdrawn such sum, the said clerk shall immediately apply the same to the payment of such judgment and either transmit the same to such condemnee or cause him to be notified that he holds the same subject to his demand.

Where there has been an appeal to a jury, and a verdict has been had, the court shall, in instances where no motion for new trial is filed or bill of exceptions taken within the time provided for by law, or where such verdict has been affirmed by a proper appellate court and the remittitur from such court has been made the judgment of the superior court, enter up judgment in favor of the condemnee and against the condemnor in the amount of such verdict, together with the accrued court costs, which judgment shall

be immediately credited with the sum of money deposited by the condemnor with the declaration of taking, and which shall bear interest at the rate of 7 per centum per annum upon any increase from the amount so deposited; and, upon the failure or refusal of the condemnor to immediately deposit such increase in such sum into the registry of the court, as well as the accrued court costs, it shall be the duty of said clerk to issue execution therefor.

In any event, the case shall be transferred, under the conditions heretofore set out, to the closed docket; nor shall anything herein provided for be construed as in any way affecting the title acquired by the condemnor by virtue of the declaration of taking provided for in section 3 of this Act.

Section 9. If the owner or owners, or any persons having a claim against or interest in said property, shall be dissatisfied with the amount of the estimated compensation stated in the declaration of taking and deposited in court pursuant to section 3 of this Act, such person or persons, or any of them, having filed in court their notice of appeal ... may ... file in the case a petition for an interlocutory hearing on the issue whether the amount deposited in court as just and adequate compensation is sufficient. ...

... the case shall be referred to a special master .... The special master shall determine ... whether the condemnor should be required to deposit any additional amount as estimated compensation, and shall within 10 days of the date of reference to him make

an interlocutory award based upon such determination. Upon approval of such interlocutory award by the court, and service of a copy upon the condemnor, as may be directed by the court any additional amount required to be paid by the interlocutory award.

Upon the application of the party or parties in interest, at any time before a jury verdict on the appeal, the court shall order that the additional money deposited in court be paid forthwith to the parties found to be entitled thereto, provided, however, that any party or parties receiving any payment of any amount paid into court pursuant to an interlocutory award shall, before receiving such payment, file in the case a bond in double the amount of such payment conditioned for the repayment of any amount so received by such party which may be in excess of the amount awarded by the jury upon the trial of the appeal. Such bond shall be executed by a surety company authorized to do business in this State and, in the event the amount awarded by the jury on final trial of the appeal shall be less than the total amount paid into court by the condemnor, judgment may be entered against the principal and surety on said bond for the amount by which the total amount paid into court exceeds the amount awarded by the jury, such judgment not, however, to exceed the additional amount paid into court under the interlocutory award.

Section 10. If the owner, ..., shall be dissatisfied with the compensation, as estimated in the declaration of taking and deposited in court, ..., such person ... shall have the right, at any time subsequent to the

deposit of the fund into court but not later than fifteen days following the date of the last advertisement of the cause in the official newspaper of the county, . . ., to file with the court a notice of appeal, ... Upon the filing of such notice of appeal, it shall be the duty of the court ... to cause an issue to be made and tried by a jury as to the value of the property to be taken and the consequential damages to property not taken, with the same right to move for a new trial and file a bill of exceptions as in other cases at law. When such an appeal has been filed, all subsequent proceedings thereon shall have the nature of a de novo investigation. . . . .

APPENDIX G

Excerpts from Official Materials of the State Auditor of Georgia Illustrative of Bonded Indebtedness of the State of Georgia

THE FOLLOWING IS EXHIBIT "A" OF THE OFFICIAL NOTICE OF SALE BY THE STATE OF GEORGIA OF $11,500,000 GEORGIA EDUCATION AUTHORITY (SCHOOLS) BONDS AND $2,2400,000 GEORGIA BUILDINC AUTHORITY (PENAL) BONDS WITH REFERENCE TO THE SALE OF SAID BONDS ON APRIL 14, 1970, AS FURNISHED BY THE OFFICE OF THE STATE AUDITOR OF GEORGIA.

SCHEDULE OF VARIOUS AUTHORITY BONDS OUTSTANDING SECURED BY LEASE RENTALS, FOR THE PAYMENT OF WHICH THE STATE OF GEORGIA IS OBLIGATED AND THE GOOD FAITH OF THE STATE IS PLEDGED.

(Outstanding as of March 2, 1970)

...ot Authority

...RGIA EDUCATION AUTHORITY (Schools):

...ries	Date of Issue	Original Amount of Issue	Outstanding	Maturities
...5A-A**	10-1-1952	$ 32,097,000	$ 4,040,000	1970/71
1953-A**	9-1-1953	63,300,000	1,175,000	1970
1954-A**	3-1-1954	32,512,000	5,745,000	1971/74
1955**	5-1-1955	29,238,000	6,767,000	1970/74
...	10-1-1961	31,452,000	22,429,000	1970/83
...	6-1-1962	26,600,000	18,995,000	1970/83
...	11-1-1961	27,905,000	24,400,000	1970/88
...	4-1-1965	27,030,000	23,300,000	1970/87
... Refunding	7-1-1966	7,450,000	None	
...	9-1-1966	32,125,000	31,755,000	1970/89
...	3-1-1967	28,020,000	27,725,000	1971/90
...-A	7-1-1967	32,120,000	31,545,000	1970/89
...-B	7-1-1967	732,000	727,000	1970/89
...-C	7-1-1967	1,247,000	1,237,000	1970/89
...-D	7-1-1967	866,000	727,000	1970/89
...	1-1-1968	21,800,000	20,795,000	1971/92
...-A	5-1-1968	5,200,000	5,095,000	1970/93
...	3-1-1969	13,245,000	13,215,000	1971/94
		$412,939,000	$239,672,000	

...RGIA EDUCATION AUTHORITY (University):

1950	10-1-1950	$ 6,000,000	$ 1,874,000	1970/80
1951	6-1-1951	6,000,000	2,132,000	1970/81
...1-A	12-1-1951	1,000,000	408,000	1970/81
...	5-1-1953	7,500,000	3,554,000	1970/83
...	11-1-1957	6,000,000	3,565,000	1970/82
...	4-1-1958	9,000,000	4,837,000	1970/83
...*	9-1-1958	5,877,000	4,570,000	1970/89
...	5-1-1961	13,000,000	8,730,000	1970/86
1961*	9-1-1961	6,170,000	5,100,000	1970/91
1962*	9-1-1962	1,000,000	877,000	1970/2002
1963*	1-1-1963	3,538,000	3,227,000	1971/2003
1963	8-1-1963	20,000,000	16,710,000	1970/89
1964*	5-1-1964	4,000,000	3,760,000	1970/94
1964-A*	9-1-1964	23,000,000	21,445,000	1970/94

Series	Date of Issue	Original Amount of Issue	Outstanding	Maturities
1965	1-1-1965	$ 25,000,000	$ 21,455,000	1971/90
1965-A	7-1-1965	20,500,000	18,130,000	1970/90
1966	12-1-1966	25,500,000	24,290,000	1970/91
1967	5-1-1967	22,000,000	20,955,000	1970/93
1967-A	11-1-1967	20,000,000	19,590,000	1970/95
1968	3-1-1968	18,000,000	18,000,000	1971/92
1969	5-1-1969	22,000,000	22,000,000	1972/94
		$265,085,000	$265,209,000	

*Student Housing Bonds.

GEORGIA HIGHWAY AUTHORITY:

1953	7-1-1953	$ 9,750,000	None	
1954-A	6-1-1954	10,250,000	$ 653,000	1970
1954-B	12-1-1954	10,635,000	713,000	1970
1955*	10-1-1955	14,500,000	1,001,000	1971
1956-A*	6-1-1956	15,500,000	2,076,000	1971/72
1957-A*	1-1-1957	17,500,000	2,626,000	1971/72
1957-B*	7-1-1957	17,500,000	4,195,000	1971/73
1958-A*	1-1-1958	17,500,000	13,208,000	1971/78
1958-B*	7-1-1958	21,000,000	16,982,000	1971/78
1958	9-1-1958	6,200,000	6,077,000	1970/75
1961-A	4-1-1961	30,000,000	22,555,000	1970/91
1961-B	10-1-1961	35,000,000	29,830,000	1970/90
1962-A	5-1-1962	35,000,000	30,524,000	1970/91
1962-B	7-1-1962	11,600,000	9,415,000	1970/92
1962-C	10-1-1962	4,000,000	3,455,000	1970/92
1962*	1-1-1962	15,600,000	14,239,000	1971/87
1962-B*	10-1-1962	2,600,000	1,985,000	1971/77
1966-A*	1-1-1966	10,000,000	10,000,000	1974/86
1966	7-1-1966	16,600,000	15,400,000	1970/90
1967	7-1-1967	26,000,000	26,000,000	1973/97
1968	7-1-1968	25,500,000	25,500,000	1979/98
1969	7-1-1969	18,500,000	18,500,000	
		$352,235,000	$254,934,000	

*Georgia Rural Roads Authority Bonds

GEORGIA BUILDING AUTHORITY:

1953	11-1-1953	$ 9,800,000	$ 3,649,000	1970/77
1962	4-1-1962	6,600,000	4,905,000	1970/84
1965	9-1-1965	8,000,000	7,155,000	1970/90
1966	7-1-1966	3,000,000	2,580,000	1970/88
1969	2-1-1969	3,950,000	3,950,000	1971/88
		$31,350,000	$ 22,239,000	

GEORGIA BUILDING AUTHORITY (Penal):

Series	Date of Issue	Original Amount of Issue	Outstanding	Maturities
1966	1-1-1966	$ 6,500,000	$ 6,025,000	1971/92
1968	1-1-1968	3,260,000	3,195,000	1971/92
		$ 9,760,000	$ 9,220,000	

GEORGIA BUILDING AUTHORITY (Markets):

1957	4-1-1957	$ 10,000,000	$ 5,153,000	1970/81
1966	12-1-1966	1,250,000	1,120,000	1970/86
		$ 11,250,000	$ 6,273,000	

GEORGIA BUILDING AUTHORITY (Hospitals):

1961	3-1-1961	$ 8,600,000	$ 5,450,000	1971/81
1962	11-1-1962	6,500,000	4,715,000	1970/82
1966	10-1-1966	15,700,000	14,680,000	1970/92
1967	5-1-1967	13,700,000	13,355,000	1970/92
1968	5-1-1968	7,000,000	6,865,000	1970/92
		$ 51,500,000	$ 45,065,000	

GEORGIA PORTS AUTHORITY:

1950**	10-1-1950	$ 5,500,000	$ 2,975,000	1970/80
1961	12-1-1961	11,500,000	8,065,000	1970/87
1962	9-1-1962	2,600,000	1,890,000	1970/82
1966	1-1-1966	5,625,000	5,055,000	1971/92
1968	11-1-1968	8,310,000	4,895,000	1970/96
		$ 33,535,000	$ 22,880,000	

JEKYLL ISLAND-STATE PARK AUTHORITY:

1964	4-1-1964	$ 2,300,000	$ 1,890,000	1970/84
1965	9-1-1965	5,150,000	4,585,000	1970/90
1968	3-1-1968	7,000,000	6,680,000	1971/91
1968-A	11-1-1968	2,100,000	2,055,000	1970/93
		$ 16,500,000	$ 15,385,000	

STONE MOUNTAIN MEMORIAL ASSOCIATION:

1962	7-1-1962	$ 5,000,000	$ 4,050,000	1970/87
1964	8-1-1964	5,000,000	4,120,000	1970/85
1967	11-1-1967	4,550,000	4,345,000	1970/92
		$ 14,550,000	$ 12,515,000	

GRAND TOTAL	$1,198,000,000	$ 853,392,000

**Fully funded by U.S. Government Securities held by Trustee.

APPENDIX H

Excerpts from Official Materials Illustrative of the Bonded Indebtedness of the City of Atlanta, Georgia

THE FOLLOWING IS TAKEN FROM THE OFFICIAL PUBLICATION OF THE CITY OF ATLANTA, GEORGIA, OFFERING FOR SALE $18,000,000 IN GENERAL OBLIGATION SCHOOL BONDS ON APRIL 22, 1970, BEING PORTIONS OF PAGES 2 AND 3 THEREOF.

COMPUTATION OF GENERAL OBLIGATION BONDED DEBT LIMITATIONS

Assessed Valuation of Taxable Property, 1969.....$1,800,797,011

General Purpose Bonds	Amount	% of Assessed Valuation
Debt Limit	$144,063,761	8.00%
Amount Outstanding	$ 62,919,547	3.49%
Available Balance	$ 81,144,214	4.51%

School Bonds	Amount	% of Assessed Valuation
Regular Debt Limit	$ 72,031,880	4.00%
Amount Outstanding	$ 54,240,000	3.01%
Available Balance	$ 17,791,980	.99%
Special Constitutional Authorization	$ 45,000,000	2.50%
Amount Outstanding (including this $18,000,000)	$ 30,000,000	1.83%
Available Balance if issued prior to 12/31/70	$ 15,000,000	.67%

FINANCIAL STATEMENT
ASSESSED VALUATION AND OUTSTANDING DEBT
December 31, 1969

Actual Value of Property, Estimated.....$4,501,992,520
Assessed Valuation.....$1,800,797,011
Note: The City's basis of assessment of real taxable property has been changed from 35% to 40% of true market value, effective in the 1968 tax year.
Direct General Obligation Debt (Including this $18,000,000)...$ 147,159,547
Less: Sinking Funds..... 3,667,940
Net General Obligation Debt.....$ 143,491,607

Overlapping Debt:		% Applicable	
Fulton County	$40,392,000	83.6	$ 33,767,712
DeKalb County	$27,208,000	8.3	$ 2,258,264
Fulton-DeKalb Hospital Authority	$ 7,309,051	73.6	$ 5,379,462
Atlanta and Fulton County Recreation Authority Revenue Bonds	$16,410,000	66.7	$ 10,945,470
Total Direct and Overlapping Debt			$ 195,842,515

APPENDIX I

Excerpts from Official Materials of the Comptroller of Fulton County, Georgia, Illustrative of the Bonded Indebtedness of Fulton County, Georgia

FULTON COUNTY, GEORGIA

COMBINED SCHEDULE OF BONDS PAYABLE

December 31, 1969

	Interest Rates and Dates	Issue Date	Final Maturity Date	Annual Serial Payments Maximum-Minimum (Notes 1 and 2)	Bonds Authorized	Bonds Issued	Bonds Retired	Bonds Outstanding
General obligation bonds (note 1):								
1946 Courthouse annex	1 1/2% 1-1; 7-1	10-1-46	1-1-76	$ 20,000 $ 10,000	$ 2,500,000	$ 2,500,000	$ 2,207,000	$ 293,000
1946 Community health & welfare	1 1/2% 1-1; 7-1	10-1-46	1-1-76	10,000 1,000	500,000	500,000	462,000	38,000
1946 Sewage disposal system	1 1/2% 1-1; 7-1	10-1-46	1-1-76	60,000 10,000	2,000,000	2,000,000	1,754,000	246,000
1946 Park construction	1 1/2% 1-1; 7-1	10-1-46	1-1-76	34,000 1,000	1,000,000	1,000,000	878,000	122,000
1946 Public safety building	1 1/2% 1-1; 7-1	10-1-46	1-1-76	8,000 2,000	250,000	250,000	226,000	24,000
1946 Garbage disposal facilities	1 1/2% 1-1; 7-1	10-1-46	1-1-76	8,000 2,000	250,000	250,000	209,000	41,000
1946 Airport improvements	1 1/2% 1-1; 7-1	10-1-46	1-1-76	33,000 4,000	1,000,000	1,000,000	889,000	111,000
1952 Traffic improvements	1 1/2% 1-1; 7-1	1-1-52	1-1-76	867,000 152,000	12,500,000	12,500,000	11,043,000	1,457,000
1957 Traffic improvements	2% 1-1; 7-1	9-1-52	1-1-72	300,000 150,000	6,700,000	6,700,000	6,250,000	450,000
1957 Courthouse building improvements	1 1/4% 1-1; 7-1	7-1-57	1-1-87	1,140,000 [illegible]	21,540,000	21,540,000	6,475,000	15,065,000
1957 Sewer system	3 1/4% 1-1; 7-1	7-1-57	1-1-87	173,000 [illegible]	3,435,000	3,435,000	1,100,000	2,335,000
1957 Health & Welfare building	3 1/4% 1-1; 7-1	7-1-57	1-1-87	200,000 100,000	3,425,000	3,425,000	1,025,000	2,400,000
1957 County jail building	3 1/4% 1-1; 7-1	7-1-57	1-1-87	180,000 90,000	2,250,000	2,250,000	600,000	1,650,000
1957 Juvenile Court building	3 1/4% 1-1; 7-1	7-1-57	1-1-87	100,000 50,000	2,000,000	2,000,000	675,000	1,325,000
1957 Airport improvements	3 1/4% 1-1; 7-1	7-1-57	1-1-82	100,000 50,000	1,850,000	1,850,000	575,000	1,275,000
1963 Traffic improvements	Various 1-1; 7-1	7-1-63	1-1-88	25,000 25,000	500,000	500,000	200,000	300,000
1963 Sewer system	Various 1-1; 7-1	7-1-63	1-1-88	550,000 300,000	10,750,000	10,750,000	1,050,000	9,700,000
1963 Water system	Various 1-1; 7-1	7-1-63	1-1-88	200,000 50,000	3,700,000	3,700,000	100,000	3,600,000
1963 Library improvements	Various 1-1; 7-1	7-1-63	1-1-78	50,000 50,000	500,000	500,000		500,000
1963 Health & Welfare	Various 1-1; 7-1	7-1-63	1-1-78	50,000 50,000	500,000	500,000	100,000	400,000
1963 Land fill	Various 1-1; 7-1	7-1-63	1-1-72	75,000 50,000	400,000	400,000	100,000	300,000
Total general obligation bonds (Exhibit K-1)					$77,650,000	$77,650,000	$36,215,000	$41,435,000
Revenue bonds:								
1957 South Fulton Water System (Exhibit K-1) (note 2)	5% 1-1; 7-1	7-1-57	7-1-87	None None	$ 1,050,000	$ 1,050,000	$ 870,000	$ 180,000
1968 North Fulton Water System (Exhibit F-1)	3 1/4% 1-1; 7-1	1-1-68	1-1-97	31,000 5,000	400,000	400,000	5,000	395,000
1969 North Fulton Water System (Exhibit F-1)	4 1/4% 1-1; 7-1	7-1-69	1-1-99	45,000 2,000	300,000	300,000		300,000
Total revenue bonds					$ 1,750,000	$ 1,750,000	$ 875,000	$ 875,000

Note 1. At December 31, 1969 payment of general obligation bonds maturing on January 1, 1970 had been made to the fiscal agents, and such maturities are included in bonds retired as shown above.

Note 2. Water revenue bonds, series 1957 mature July 1, 1987. The County may at its option redeem said bonds prior to maturity using sinking funds accumulated in excess of the amount required for interest payments for the current and next succeeding sinking fund year.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
SEP 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 584

DURWOOD T. PYE,
Appellant,

VERSUS

STATE HIGHWAY DEPARTMENT OF GEORGIA
AND
HOWARD W. ALLGOOD
Appellees.

Appeal from The Supreme Court of Georgia

MOTION TO DISMISS OR AFFIRM

ARTHUR K. BOLTON
Attorney General of Georgia
HAROLD N. HILL, JR.
Executive Assistant Attorney General
RICHARD L. CHAMBERS, III
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
E. J. SUMMEROUR
Deputy Assistant Attorney General
Suite 607 Peachtree-Palisades Bldg.
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309
MARSHALL R. SIMS
Deputy Assistant Attorney General
105 South State Street
Griffin, Georgia 30223
Counsel for Appellee,
State Highway Department of Georgia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 584

DURWOOD T. PYE,

Appellant,

VERSUS.

STATE HIGHWAY DEPARTMENT OF GEORGIA ET AL.,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellee, THE STATE HIGHWAY DEPARTMENT OF GEORGIA, respectfully moves the Court to dismiss the Appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Georgia, on the grounds that the decision below is clearly correct and the question is so unsubstantial as not to warrant further argument.

I.

THE STATE CONSTITUTIONAL PROVISION INVOLVED AND QUESTIONS PRESENTED

A.

The Constitutional Provision

Art. I, Sec. III, Par. I of the Georgia Constitution

provides for condemnation of private property and for the payment of just and adequate compensation therefor, as follows:

> "In case of necessity, private ways may be granted upon just compensation being first paid to the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid, except that when private property is taken or damaged for public road and street purposes by the State and the counties and the municipalities of the State, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law, *but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness.* The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders and the State and its subdivisions may be protected." (Italics added for reference purposes.) Ga. Code Ann., § 2-301 (1969 Cum. Supp.)

Appellant has attacked the italicized portion of the paragraph, the so-called subordination provision.

Appellant-condemnee has failed to allege or prove the existence of any bonded indebtedness superior to his right of just and adequate compensation.

In this Court, but not in any court below, appellant has sought to show, for the first time, the existence of "bonded indebtedness". In his Jurisdictional Statement, appellant has included Appendix H (purporting to show the bonded indebtedness of the City of Atlanta, Georgia)

and Appendix I (purporting to show the bonded indebtedness of Fulton County, Georgia).

Because this case was instituted by the *State* Highway Department of Georgia, and the compensation for appellant's property comes solely from the State, the asserted bonded indebtedness of the City of Atlanta and Fulton County is wholly irrelevant to this litigation.

Appellant has also (for the first time) included in his Jurisdictional Statement Appendix G, which he has asserted shows the bonded indebtedness of the State, whereas (as will be conclusively demonstrated below) Appendix G shows the bonded indebtedness of certain Authorities, which bonds are not debts of the State.

B.

Questions Presented

1. Where appellant-condemnee's right to just and adequate compensation is not subordinated to any bonded indebtedness, does appellant have standing to challenge the constitutionality of a subordination provision?

2. Where appellant-condemnee's right to just and adequate compensation is not subordinated to any bonded indebtedness, does a subordination provision deprive appellant of due process or equal protection of the law?

3. Is such a substantial federal question presented by this appeal as is necessary to the appellate jurisdiction of this Court?

II.

ARGUMENT

This Appeal Presents No Substantial Question

Appellant has correctly conceded the following proposition of law:

> "The United States Constitution does not require that payment be made in advance of taking. . . ." (Appellant's Jurisdictional Statement, p. 20.)

This Court so held in *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.*, 169 U.S. 557, 568, 569 (1898), *Dohany v. Rogers*, 281 U.S. 362, 366 (1930), and *Bailey v. Anderson*, 326 U.S. 203, 205 (1945).

The Georgia constitutional provision here in issue was amended in 1960 so as to provide the public benefit to be derived from the foregoing legal principle. Ga. Laws 1960, p. 1225 (Ratified November 8, 1960).

Pursuant to such constitutional authorization, in 1961 the Georgia General Assembly adopted the Act, entitled "Procedure for the Exercise of Power of Eminent Domain", referred to in Appendix F of appellant's Jurisdictional Statement.

That Act requires that the condemnor (appellee herein) file with its declaration of taking a "statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken, including consequential damages to land not taken, accompanied by a sworn copy as an exhibit of the appraiser's report justifying said sum." Ga. Laws 1961, § 3(5), p. 517 at 520, as amended, Ga. Code Ann., § 36-1303(5). At the same

time, the condemnor is required to deposit in court the compensation estimated to be due.

As has been pointed out by the Supreme Court of Georgia in *State Highway Department v. Smith*, 219 Ga. 800, 808 (1964): "Our Act of 1961, as amended, is in all material respects like the Federal statute (40 U.S.C.A., § 258a) designed for the same purpose, the validity of which has been repeatedly upheld against similar constitutional attacks."

The Federal statute has, indeed, been held valid. See *Travis v. United States*, 287 F. 2d 916, *cert. denied*, 368 U. S. 824 (1961).

In this case, the sum of $19,000.00 was estimated to be due to appellant and was paid into court. Appellant has described the procedural and substantive protection thereafter afforded him as follows (appellant's Jurisdictional Statement, p. 30):

> "Not earlier than 15 days following publication each week for four weeks of notice of the filing of the declaration of taking and the condemnation petition, appellant was authorized to make application to the court for the $19,000.00 and have the same paid to him on account. He was also entitled to apply for the appointment of a special master to require payment into court of additional amounts, and if the master's report so requiring, be approved by the court he was entitled to have such additional amounts paid to him upon giving bond with security in double the sum thereof. Appellant was also authorized to appeal to a jury for ascertainment of just and adequate compensation (which appellant did subject to all his contentions of illegality). Following the jury trial either party, State Highway Department or appellant, is authorized 'to move for

a new trial and file a brief of exceptions as in other cases at law.'

"When just and adequate compensation 'has been finally fixed and determined as provided by law', i.e., after jury trial, and disposition of any motion for new trial by State Highway Department or appellant, and after new trial if such be granted, etc., *then,* at that stage, appellant 'shall then be paid in preference to all other obligations *except bonded indebtedness.*'"

Thus, appellant admits that the $19,000.00 paid into court is not subordinated (see also appellant's Jurisdictional Statement, pp. 30-31), and consequently, the only amount which could be subordinated is the difference, if any, between the amount paid into court and the final award.

However, appellant has not shown that there is any bonded indebtedness as to which such difference, if any, can be subordinated. Certainly, he has nether alleged nor proved the existence of any such indebtedness. Certainly also, no bonded indebtedness of a city or county could take preference over a judgment in his favor, if any, against the State.

What appellant has done is to assert, for the first time, that bonds issued by certain state authorities are bonds of the State. (See Appendix G to appellant's Jurisdictional Statement). It is difficult for us to see how the appellant could make that mistake. Authority bonds are not State bonds; that is why Georgia has Authorities.

Take Georgia Education Authority (Schools), Ga. Laws 1951, pp. 241 at 252 (as amended), for example. Section 14 (Ga. Code Ann., § 32-1414a) provides that:

"Revenue bonds issued under the provisions of this

> Act shall not be deemed to constitute a debt of the State of Georgia or a pledge of the faith and credit of the State, but such bonds shall be payable solely from the fund hereinafter provided for and the issuance of such revenue bonds shall not directly, indirectly or contingently obligate the State to levy or to pledge any form of taxation whatever therefor or to make any appropriation for the payment, and all such bonds shall contain *recitals on their face covering substantially the foregoing provisions of this section* . . . ." (Emphasis supplied.)

All the Authorities referred to in Appellant's Appendix G were created by Acts containing provisions that their bonds do not "constitute a debt of the State or a pledge of the faith and credit of the State. . . ." Georgia Education Authority (University), Ga. Laws 1949, pp. 1009, 1017; Georgia Highway Authority, Ga. Laws 1967, pp. 385, 403; Georgia Building Authority, Ga. Laws 1951, pp. 699, 708; Georgia Building Authority (Penal), Ga. Laws 1960, pp. 892, 901; Georgia Building Authority (Markets), Ga. Laws 1955, pp. 224, 239, 240; Georgia Building Authority (Hospitals), Ga. Laws 1939, pp. 144, 152; Georgia Ports Authority, Ga. Laws 1945, pp. 464, 472, 473; Jekyll Island—State Park Authority, Ga. Laws 1950, pp. 152, 160, Ga. Laws 1960, pp. 89, 93; Stone Mountain Memorial Association, Ga. Laws 1958, pp. 61, 75.

Pursuant to the above quoted statutory directive, all Authority bonds contain the following recital on their face:

> "The bonds of this Series do not constitute a debt of the State of Georgia or a pledge of the faith and credit of the State, and no holder shall have the right to compel any exercise of the taxing power of the State to pay such bonds or interest thereon. . . ."

Moreover, all Authorities referred to in appellant's Appendix G contain identical directives. Ga. Code Ann. § 32-1414a; Ga. Code Ann. § 32-114a; Ga. Code Ann. § 95-2323; Ga. Code Ann. § 91-514a; Ga. Code Ann. § 77-1014; Ga. Code Ann. § 65-324; Ga. Code Ann. § 99-1414; Ga. Code Ann. § 98-207; Ga. Code Ann. § 43-618a; Ga. Code Ann. § 43-6, note (Ga. Laws 1958, pp. 61, 75).

The Supreme Court of Georgia has repeatedly held that Authority bonds are not State bonds. *McLucas v. State Bridge Bldg. Authority*, 210 Ga. 1, 6, 77 S.E. 2d 531, 535 (1953); *State of Georgia v. Regents of University*, 179 Ga. 210, 216, 175 S.E. 567, 570, 571 (1934); *Sheffield v. State School Bldg. Authority*, 208 Ga. 575, 579, 68 S.E. 2d 590, 594, 595 (1952). In *McLucas v. State Bridge Bldg. Authority*, supra, the Court said:

> "While the Authority is an instrumentality of the State, it is nevertheless not the State, nor a part of the State, nor an agency of the State. It is a mere creature of the State, having distinct corporate entity. Its revenue bonds, as section 23 of the act expressly and emphatically declares, are not obligations or debts of the State, nor a pledge of the credit of the State, but they are payable solely and exclusively from revenue derived from a use of its facilities; and the State is not directly, indirectly, or contingently obligated to levy or pledge any form of taxation whatsoever therefor or to make any appropriation for the payment of them, and the act requires that the bonds, when issued, must contain recitals on their face to this effect. They are first, last, and always a corporate debt of the Authority and in no sense a debt of the State." (210 Ga. at 6, 77 S.E. 2d at 535.)

In Georgia, it is well known that the Authorities were

created to avoid the constitutional prohibitions on the State's borrowing money, so well known as to be "text book" knowledge. According to the Encyclopedia of Georgia Law:

> "This title [Authority Financing] is concerned with the development of a system for the acquisition of funds for public purposes without the creation of such public debts as are prohibited by the State Constitution, or which might adversely affect the credit of the state and its political subdivisions." (*3 E.G.L. Authority Financing*, § *1*.)

If appellant had contended in the courts below that Authority bonds were State bonds, the courts below would have already disposed of this alleged issue.

Nevertheless, the court below found as follows (Appellant's Jurisdictional Statement, Appendix C, p. 60):

> "In our view he lacks standing to make this contention. The estimated amount of compensation for taking his property was in fact paid into court. He has not been injured by the subordination provision and therefore does not show any 'infringement upon his rights' due to such provision. Ga. Music Operators Assn. v. City of Atlanta, 183 Ga. 794 (190 SE 32)."

The cited decision, *Ga. Music Operators Assn. v. City of Atlanta*, relied in part upon the decision of this Court in *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 410 (1900), where it was held that a person with actual notice of a land registration proceeding could not challenge the constitutionality of a provision of the land registration act allowing notice by publication (and other means of constructive notice), because he was not affected by the provision of which he complained. Appellant herein is not affected by the subordination provision

of which he complains, and he has no standing to challenge its constitutionality.

In *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316, 324, 325 (1945), this Court, citing *Tyler, supra*, held:

> "In any case the Court will not pass upon the constitutionality of legislation . . . upon the complaint of one who fails to show that he is injured by its operation. . . ."

The Georgia Supreme Court correctly decided that appellant has no standing to challenge the validity of the so-called subordination clause.

If appellant had the necessary standing, our argument would be that subordination no more violates due process or equal protection than do the laws of bankruptcy. Subordination to state bonds, if there were any, would only become critical if the amount of the supposed bonds exceeded the ability of the State to pay them when due. Such subordination would not erase a condemnee's right to just and adequate compensation; but would at most merely delay payment, if the State were unable to pay both non-existent bonds and just compensation when due. Subordination does not violate due process or equal protection. Georgia law, moreover, recognizes the remedy of mandamus to enforce a final judgment fixing the amount of compensation. *Harrison v. State Highway Department of Georgia*, 183 Ga. 290, 295, 296, 188 S.E. 445, 448 (1936).

From the foregoing, it appears that appellant is without standing, his contentions are without substantial merit, and his appeal should be dismissed for failure to present a substantial federal question. *Zucht v. King*, 260

U.S. 174, 176 (1922); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952) (per curiam); *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 596, 599 (1913); *Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.*, 252 U.S. 388 (1920).

CONCLUSION

It is respectfully submitted that the decision of the Court below is clearly correct, that the Appellant is without standing before this Court to raise the question sought to be raised, that the question is so unsubstantial as not to warrant further argument; and that the public interest in a final decision would be best served by the dismissal of this Appeal, or, alternatively, the affirmance of the judgment entered in this case by the Supreme Court of Georgia.

Respectfully submitted,

/s/ ARTHUR K. BOLTON

132 State Judicial Bldg.
Atlanta, Georgia 30334

ARTHUR K. BOLTON
Attorney General of Georgia

/s/ HAROLD N. HILL, JR.

132 State Judicial Bldg.
Atlanta, Georgia 30334

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ RICHARD L. CHAMBERS, III

132 State Judicial Bldg.
Atlanta, Georgia 30334

RICHARD L. CHAMBERS, III
Assistant Attorney General

/s/ MARSHALL R. SIMS

105 South State St.
Griffin, Georgia 30223

MARSHALL R. SIMS
Deputy Assistant Attorney General

/s/ E. J. SUMMEROUR

Suite 607 Peachtree-
Palisades Building
1819 P'tree Rd., N.E.
Atlanta, Georgia 30309

E. J. SUMMEROUR
Deputy Assistant Attorney General

Counsel of Record for Appellee,
State Highway Dept. of Georgia

PROOF OF SERVICE

I, RICHARD L. CHAMBERS, III, hereby certify that I am counsel for the Appellee, State Highway Department of Georgia, that I am a member of the Bar of the Supreme Court of the United States, and that on the 11th day of September, 1970, I served the within and foregoing Motion to Dismiss or Affirm upon the Appellants herein named by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at their proper post office addresses, to-wit:

HONORABLE DURWOOD T. PYE
801 Fulton County Courthouse
Atlanta, Georgia 30303

HONORABLE P. RUSSELL TARVER
2922 First National Bank Tower
No. 2 Peachtree Street
Atlanta, Georgia 30303

HONORABLE E. LEWIS HANSEN
Palmour Building
Atlanta, Georgia 30303

I further certify that all parties required to be served have been served.

/s/ RICHARD L. CHAMBERS, III

RICHARD L. CHAMBERS, III

Counsel for Appellee,
State Highway Department of Georgia